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THE LAWYER'S BRIEF—ITS REQUISITES AND VALUE.

A very important part of a lawyer's work is the preparation and submission of briefs for both *nisi prius* and appellate tribunals. The former, however, are hardly more than memoranda of authorities, the latter present the entire case to the appellate tribunal and the advocate fails or succeeds there wholly on the weakness or efficacy of his printed brief. Nothing is more important therefore than a perfect brief.

The different parts of a brief vary in some particulars in the different states. The statutes and the rules of court must always be carefully consulted. Most usually, however, the different parts of the brief are as follows: first, abstract of the record; second, statement of the case; third, assignment of errors; fourth, points and authorities; fifth, argument; sixth, index. The order of the various parts may be changed but the order here given is universally recognized as the most perfect and logical.

The abstract of the record should be full, but not verbose; accurate, but clear. Clearness and brevity are the two most necessary qualities. The purpose of the abstract is to make the important evidence easily accessible to the court. It is therefore always advisable to have the abstract *sub-headed* throughout, showing at a glance where the testimony of one witness ends and another begins; and every other resource of printer's ink and of wise arrangement should be taken advantage of to make the abstract attractive to the court,—something it very seldom is. Such an abstract will invite the attention of the court where a voluminous, unintelligible and slovenly printed one will repel an investigation even on the part of a most painstaking and conscientious judge.

The statment of facts in a lawyer's brief ought to test the strength of his case. In the facts lies the justice of the cause. The best case can be so obscurely stated as to conceal its merits; and the weakest can be so plausibly stated as to make a first good impression. A famous writer says that every cause has a bad side; and it may be affirmed that the worst of causes has at least one good side. The art is to make the best of your case. "An eminent member of the bar," said Judge Daly, of New York, "told me that from the beginning of his practice he had made this part of his brief a special study, when presenting a case to an appellate tribunal or to a single judge; and that the first compliment he received from the court was for his statement of the facts of a most complicated case. He had devoted great care to arranging the array of particulars so as to make the comprehension of the facts as easy as possible, and he was told that it was mainly his statement of the facts that won the case, a compliment that gave intense satisfaction to a young practitioner. It was this gentleman's belief that success in appeal cases largely depended on a clear statement of fact in the brief. It is undeniable that if such a statement is lucid and convincing and impresses the court with the justice of your cause your argument on the law will be greatly aided. In a case doubtful or novel as to the legal questions involved, doubt is certain to be resolved on the side of substantial justice."

The assignment of errors is simply a copy of the points submitted as grounds for the motion for a new trial. The points and authorities is a short digest of the law of the case, citing all the authorities sustaining the various points of law on which you desire to insist in the argument. Here the statements of the legal propositions should be short and succinct and so carefully worded as to evidence at once a direct connection and bearing upon the facts of the particular case. In the written argument insistence should be laid upon the most important points, which again should be arranged in the order of their force and conclusiveness on the advocate's case, the most important point of all coming last. The index also is not to be slighted, as it too often is. The advocate must remember that the judges are men and will always take the path of the least resistance in arriving at a decision. He should be careful, therefore, that his opponent's brief, by its clear and logical arrangement and its complete and exhaustive index, does not offer a more accessible avenue to a knowledge of the case than his own brief.

Before passing to the last requisite of a good brief, we desire to reiterate the emphasis we have already placed upon the general characteristics of an ideal brief, *i. e.*, clearness and brevity. It is, indeed, a pleasure for a court to take up a brief and find everything in such shape that they are enabled to gain a complete idea of the whole case by simply glancing through its pages and find the statements therein contained so clear that a second reading is never necessary. And brevity is even more important. A glance through the decided cases will show how often courts have condemned the practice of submitting voluminous briefs, and in some cases have stricken them from the files. There is absolutely no occasion for a brief to exceed one hundred pages. We make this statement advisedly after consulting more than five hundred briefs filed in our state and federal courts. In most instances they need not exceed fifty pages. If the abstract of the evidence is necessarily large by reason of some rule of court requiring all evidence to be set out in detail or under some statutes permitting what is called the "short form" of appeal, that is, without filing a transcript, the abstract should be published separately and carefully sub-divided, sub-headed and indexed.

With respect to the composition of briefs and points submitted to the court, so far as literary style is concerned, and whether any impression is made by care in that respect, it may be inferred that the substance, rather than the form of a brief, is the thing considered by a judge. This is not necessarily because of the great pressure of business and the little time left for dwelling upon matters of mere style, for it is the duty as well as the inclination of a judge to look at the counsel's law and not at the manner in which he states it; yet it must be evident that formof expression can add much to the force and impressiveness of a statement. The opinion of learned judges often shows this. One is particularly happy in his choice of words; and another, less so. "A strong opinion," says Judge Daly, to quote again from an address delivered by this learned judge, "is one containing law and reason, plainly stated in the most forcible way; while an equally sound utterance may be weak, because lamely and insufficiently delivered. It is not, however, to be denied that a lawyer's training for his profession is not complete until he has so mastered the form of expression as to present his statements with directness, nor until he has acquired a vocabulary extensive enough to give every shade of meaning and the art to use it for substantial ends and to the best effect."

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—FEDERAL SUCCESSION TAX ON BEQUEST TO MUNICIPALITY.—The dual system of government prevailing in the United States sometimes gives rise to disagreeable clashes of authority. An instance of this is to be found in the recent case of Snyder v. Bettman, 23 Sup. Ct. Rep. 803, where it was held that a succession tax imposed under the authority of the Act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286), upon a bequest to a municipality for public purposes, is not unconstitutional as a tax upon an agency of the state, since such tax, being collected from the property while in the hands of the executor, who is required by section 30 of that act (Act June 13, 1898, 30 Stat. at L. 465, chap. 448, U. S. Comp. Stat. 1901, p. 2310) to liquidate it "before payment and distribution to the legatees," cannot be regarded as a tax upon the municipality, although it may operate incidentally to reduce the bequest by the amount of the tax. The court said in part:

"The case of Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747, must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that, under our constitution, the devolution of property is determined by the laws of the several states.

Conceding fully that congress has no power to impose a burden upon a state or its municipal corporation, the question in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. Thus in Van Allen v. The Assessors (3 Wall. 573), *sub nom.* Churchill v. Utica (18 L. Ed. 229), we held it to be within the power of the states to tax the shares of national banks, though a part or the whole of the capital of such bank were invested in national securities exempt from taxation, upon the ground that the taxation, of the shares was not a taxation of the capital. So a tax

upon deposits was upheld, though such deposits were invested in United States securities (Soc'y for Sav. v. Coite, 6 Wall. 594, 18 L. Ed. 897; Provident Inst. for Sav. v. Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. Ed. 904). The same principle was extended to a statute of New York, imposing a tax upon corporations measured by its dividends, though such dividends were derived from interest upon government bonds (Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593). As the tax in the case under consideration is collected from the property while in the hands of the executor (sec. 30), who is required to liquidate it "before payment and distribution to the legatees," we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax. Such incidental effects are common to many, if not all, forms of taxation — indeed, it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed.

Having determined, then, that congress has the power to tax successions; that the states have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that congress has the same power to tax the transmission of property by legacy to states or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

LIBEL AND SLANDER—WHAT ARE THE LIMITS OF FAIR COMMENT UPON THEATRICAL OR LITERARY WORK.—The decision in the recent English case of McGuire v. The Western Morning News, in which the court of appeals entered judgment for defendants, is of considerable importance in defining an often litigated question in the law of libel. The action was brought by an actor-manager against the defendant newspaper for damages for libel on account of an article upon a play produced by the plaintiff, which, as he contended, was not "fair comment." Actual malice, personal imputations or untruth were none of them alleged, and as the court pointed out, the innuendo alleged went to matters of opinion only. Obviously, then, the case raises a very important question as to what are the limits of "fair comment," in the case of a literary work, and whether in such a case the judge ought to leave the question to the jury at all. The trial judge left the question of fairness to the jury. In reversing the judgment obtained in the lower court the court of appeal hold that the question whether a comment is fair or not is never for the jury. "Fair," used in this connection, certainly does not mean, as the Master of the Rolls emphasized, that which the ordinary, reasonable man, the juryman, common or special, would think a correct appreciation of the work. To hold such a thing would be absolutely destructive of all criticism in the true sense of the word.

The Solicitors Law Journal, in commenting on the effect of this decision says: "To substitute the opinion of the jury for that of the critic, as a test of fairness, would be unjust and absurd. In such cases, therefore, where there is nothing in the criticism which can possibly support an inference of unfairness, nothing which is outside the domain of criticism itself, there is nothing to leave to the jury, and it is the province of the judge to withdraw the case from the jury. In fact, the judge must in every case decide, in the first instance, whether the criticism is capable in law of being a libel. In this particular case not only did the learned judge fail to exercise his judgment on that point, but in leaving the question to the jury he directed them in such a way as to suggest to them that they were at liberty, in considering whether the criticism was fair, to apply the standard of their own taste to the appreciation of the work criticised. It is not too much to say that if the decision had been affirmed it would have been a most disastrous fetter upon the right of free criticism which has been established in this country by a long course of decisions."

Another learned English commentator on this decision, has this to say: "Criticism that is fair is lawful; but the difficulty is to define the word 'fair.' The judges have generally refused to give any exact definition of 'fair,' but the case of Merivale v. Carson, 36 W. R. 231, 20 Q. B. D. 275, and the present case go a long way towards explaining what it does really mean. In the older case Lord Esher, M. R., said: 'I think the meaning is this: Is the article, in the opinion of the jury, beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion or to prejudice, and then an ordinary set of men, with ordinary judgment, must say whether any fair man would have made such a comment on the work. Mere exaggeration, or even gross exaggeration would not make the comment unfair.' And Bowen, L.J., said: 'A man is entitled to entertain any opinion he pleases, however wrong, exaggerated or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.' He then proceeded to point out that to make any personal attack on the character of the author, or to impute to the author that he has written something which in fact he has not written, would be outside the limits of fair criticism. In the recent case, Collins, M.R., pointed out that a jury have no right to substitute their own opinion of the merits of a work for the opinion of the critic, and that there is no question to be left to a jury unless

there is some evidence of unfairness; that criticism is not fair which is used to make personal imputations, or to make statements not based on fact. To be fair, criticism must be honest and also relevant. The learned judge went on to state that if a document which purports to be a comment on a matter of public interest is alleged to be libelous, it is for the plaintiff to show that it goes beyond the limits of fair criticism; it is for the judge to say whether the document is reasonably capable of being so interpreted; and if he decide that it is not so capable, there is no question to be left to the jury. This case will probably go far towards putting a check on actions against newspapers in respect of comments on books and plays. The freest possible hand ought to be allowed to the honest critic. If he thinks a play is bad, he ought to say so; it would be dishonest to act otherwise. He may be wrong, and he may use language which seems unnecessarily strong to a jury, but if he writes honestly, he ought to be protected. If a critic thinks well of a play or a book, but condemns it to injure the author, he is acting dishonestly, however moderate his condemnation may be, and he is liable to an action. If he makes his criticism a cover for an attack on the character of the author, he is undoubtedly liable. And again, if he represents to the author's discredit that he has written something which in fact he has not written, the critic is guilty of a libel. But in all other cases the law should protect criticism of matters of public interest, like plays or books, which an author by production deliberately submits to the judgment of the public."

NEGLIGENCE—DIRECTING A VERDICT IN A CASE WHERE THE MAXIM RES IPSA LOQUITUR IS APPLICABLE.—To plaintiffs in personal injury cases the doctrines expressed in the Latin phrase of *res ipsa loquitur* is always interesting and any new light on the subject which shows up more clearly the advantages which the doctrine offers to such plaintiffs, is always hailed with delight. A recent opinion handed down by the Court of Appeals of the District of Columbia, will therefore be eagerly received by attorneys in such cases. In Kohner v. Capitol Traction Company (District of Columbia Appeals), 31 Wash. Law Rep. 442, it was held that where it is shown on behalf of a plaintiff, in an action for personal injuries, that while riding as a passenger on one of the defendant's street cars he was injured by the violent contact of the right hand of the conductor of the car with the plaintiff's face, lacerating and bruising his nose and right eye, the doctrine of *res ipsa loquitur* applies, and the defendant has the burden of showing that there was no negligence on its part, and that the injury was the result of unavoidable accident.

So far, the case shows nothing out of the ordinary. In fact the appellee admitted that the doctrine might be *prima facie* applicable, but that the explanation offered completely destroyed plaintiff's case and justified the trial court in directing a verdict for the defendant. In this case the testimony offered by the defendant in explanation of the injury was to the effect that while the conductor was moving forward on the side-step of the car holding punched transfers in his hand, he in some unaccountable way lost his balance and was about to fall from the car, and that in trying to regain his balance he threw his other hand forward to grasp the stanchion of the car against which the plaintiff was reclining his head, and in doing so struck him in the eye. The Appellate Court held that whether or not such explanation, if well founded in fact, was sufficient in law to rebut the presumption of negligence, the question of its truth was for the jury, and the trial court erred in directing a verdict for defendant. Here then is a somewhat new and interesting phase of the question before us, justifying us in taking the court into our confidence and considering carefully the arguments which it has to advance in support of its position. The court says:

"It does not seem to be controverted on the part of the appellee that the doctrine is at all events *prima facie* applicable. So far as it is apparent, the plaintiff was a peaceable passenger on the defendant's car, and as such he was entitled to be safely transported to his destination, so far at least as reasonable care and prudence on the part of the defendant and its employees could effect that result, and he was entitled to absolute immunity from all unlawful assault and injury on the part of the agents and employees of the defendant. Being so entitled, he was unlawfully assaulted and injured by the conductor. It is plainly a case where the doctrine of *res ipsa loquitur* applies, and throws upon the defendant the burden of proving that there was no negligence on its part, and that the injury was the result of unavoidable accident. In other words, the plaintiff proved a *prima facie* case of negligence on the part of the defendant and resulting injury to himself. In the absence of satisfactory explanation by the defendant no more was required to justify a verdict in favor of the plaintiff.

But the defendant did offer an explanation, which was in effect that the act of the conductor by which the plaintiff was injured was wholly unintentional and accidental on his part, and that it was merely the result of an effort by him to save himself from serious injury. Whether this explanation was sufficient in law to rebut the presumption of negligence raised by the *prima facie* case of the plaintiff, since it leaves untouched the question whether the conductor was not guilty of negligence in placing himself in such position as that he was in danger of falling off, may perhaps be doubted. It is usual for conductors, whether collecting fares or distributing transfers, to hold on to one stanchion of these summer cars and not to let go their hold of it before they have firmly grasped another stanchion, as otherwise there is always danger of their being thrown off; and it does not appear in this case whether the con-

ductor was free from negligence in this regard. But however this may be, and assuming that the explanation, if well founded in fact, was sufficient in law to rebut the presumption of negligence, yet the que-tion remains whether it was well founded in fact.

Now, it is not for the court to determine the question of the truth of the explanation given; that is peculiarly the province of the jury. The plaintiff has proved a *prima facie* case of negligence; the defendant has offered an explanation which tends to show that there was no such negligence. This raises a disputed question of fact, proper to be pased upon by the jury, under instructions duly formulated by the court for the purpose. Unless, therefore, we are to adopt the theory that the plaintiff's *prima facie* case only lasts until the defendant has offered some explanation, and that such explanation, whether true or false, destroys the presumption of negligence raised by the plaintiff's proof, and casts upon the plaintiff the necessity of proving by additional testimony in rebuttal that notwithstanding the explanation there was in fact negligence on the part of the defendant, there is no escape from the conclusion that the case must be submitted to a jury. But we find no warrant in reason or in adjudicated cases for such a theory. No case has been pointed out which holds such a doctrine. No case has been pointed out where a verdict has been directed for the defendant because the defendant's explanation has tended to controvert the presumption of negligence, and the explanation itself has remained uncontroverted by testimony in rebuttal. We find that in all the cases the question of the defendant's negligence, under such condition of the testimony, has been submitted to the jury for its determination."

EXTENT OF THE PUBLIC EASEMENT IN COUNTRY HIGHWAYS.

The proposition is firmly established that where an abutter upon a country road retains the fee of the soil over which the highway runs, the public possesses only an easement. The extent of this servitude remains in doubt. Our courts, with considerable unanimity, have ascertained the scope of the public right in city streets, but they are inclined to distinguish between the objects for which the urban and the rural highway may be utilized. Though such a discrimination is repeatedly recognized, the principles underlying it are but vaguely disclosed. It is generally said, the purpose of the original dedication or appropriation is the distinguishing test; and that purpose, so far as relates to a country road, is to afford an "easement of passage and its incidents,"[1] or an "avenue of communication,"[2] or a "way to be used for all purposes by which the object of its creation as a public highway could be promoted,"[3] or one for such "uses as the public welfare and convenience demand,"[4] or it creates an easement consisting of a "right of the public to a free and unobstructed use of the road as a public highway."[5] Again, the extent of the easement is held to be the "use of the surface, with such rights incidental thereto as are essential to such use,"[6] or it is confined to using the road for "highway purposes,"[7] or for such modes of travel "as we are accustomed to see on streets and highways."[8]

These criteria are worthless. It is idle to say the purpose of dedication was to lay out a road for "highway purposes," when the question involved is the meaning of the word "highway;" nor will the customary use afford a sufficient test, else every new species of vehicle or mode of transportation would be excluded. Neither is the "public welfare and convenience" a standard, for this would allow the erection of permanent structures, as bicycle rests or restaurant stands, along the roadways; and the subject is left in equal uncertainty by stating that the country highway may be used for the purpose of passage "and its incidents," where those incidents are not clearly defined.

Other decisions lay down a stricter rule, and confine the public use of the road solely to "travel." Thus, it is declared that "primarily, there can be no doubt that the use (of public roads) is for passage over the highway. * * * The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move

[1] Chesapeake Tel. Co. v. Mackenzie, 74 Md. 36, 47, 21 Atl. Rep. 690; Postal Tel. Co. v. Eaton, 170 Ill. 513, 39 L. R. A. 722, 49 N. E. Rep. 365; Sterling's Appeal, 111 Pa. 35, 40, 2 Atl. Rep. 105.

[2] Cater v. N. W. Tel. Co., 60 Minn. 539, 28 L. R. A. 310, 63 N. W. Rep. 111.

[3] Peddicord v. Balt. Pass. Co., 34 Md. 463, 479, 481.

[4] Huddleston v. Eugene, 34 Oreg. 343, 43 L. R. A. 444, 55 Pac. Rep. 868.

[5] Postal Tel. Co. v. Eaton, 170 Ill. 513, 39 L. R. A. 722, 49 N. E. Rep. 365.

[6] Montgomery v. Santa Anna R. Co., 104 Cal. 186, 25 L. R. A. 654, 37 Pac. Rep. 786.

[7] Kincaid v. Indianapolis Gas Co., 124 Ind. 577, L. R. A. 602, 24 N. E. Rep. 1066.

[8] Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it,"[9] and the same doctrine is tersely expressed by a Virginia court. "The right in the commonwealth is to use by going along over."[10]

To this supposed purpose of passage, some decisions have added the transmission of intelligence, thereby rendering the road more like the city street in legal contemplation, yet limiting the public use with greater strictness than in a municipality;[11] and still another method of asserting the difference between country and city thoroughfares is to say that roads are not subject to urban servitudes because the public necessities are greater in cities, thereby making it proper to impose increased burdens upon streets. "In the ordinary country highways of the state, the public simply have an easement in the soil for travelling. * * * The public easements, however, in the streets of cities and villages are more extensive. In urban streets, the public convenience and health, and the general welfare require that the soil thereof should be subjected to greater burdens. They may be used for the laying of water and gas pipes, and the construction of sewers, and some other purposes. The public generally have an interest in and are benefitted by such improvements, and they are necessities of modern life."[12] The Supreme Court of Maryland draw the same distinction by remarking: "The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber and grass growing thereon, and to all minerals, quarries and springs below the surface. But with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth and may use it in improving the street, and may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies, adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution."[13]

Contrary to the theory of "dedication for travel only," are the decisions holding that no distinction exists between the public easement in roads and streets.[14] Thus it has been remarked, "In some of the cases a distinction is suggested between highways in the country and streets within the limits of cities and towns, according to which the latter may be used for more various uses than the former, as for laying gas and water pipes, the construction of horse railways, sewers, levees, wharves and other accommodations for the public. But as both the highway and the street are opened for the same general purpose, and a street is a highway, there would

[9] Eels v. Am. Tel. Co., 143 N. Y. 135, 25 L. R. A. 640, 38 N. E. Rep. 202.

[10] Western Union Tel. Co. v. Williams, 86 Va. 696, 8 L. R. A. 429, 11 S. E. Rep. 106. Accord, see: Blashfield v. Empire State Tel. Co., 18 N. Y. Supp. 250; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. Rep. 973; Chesapeake Tel. Co. v. Mackenzie, 74 Md. 36, 47, 21 Atl. Rep. 690; Peddicord v. Balt. Pass. Co., 34 Md. 463, 479, 481; Haverford Elec. Co. v. Hart, 1 Pa. Dist. Rep. 571; Pa. Railroad Co. v. Montgomery Co., 3 Pa. Dist. Rep. 58; Heilman v. Railway Co., 145 Pa. 23, 23 Atl. Rep. 389; Cater v. Western Union Tel. Co., 60 Minn. 539, 28 L. R. A. 310, 63 N. W. Rep. 111; Eels v. Am. Tel. Co., 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. Rep. 202; Postal Tel. Co. v. Eaton, 170 Ill. 513, 39 L. R. A. 722, 49 N. E. Rep. 365; Montgomery v. Santa Anna R. Co., 104 Cal. 186, 25 L. R. A. 654, 37 Pac. Rep. 786; Bloomfield Nat. Gas Co. v. Calkins, 62 N. Y. 386; Sterling's Appeal, 111 Pa. 35, 40, 2 Atl. Rep. 105; McDeavitt v. Peoples' Nat. Gas Co., 160 Pa. 367, 28 Atl. Rep. 948; Pa. Railway Co. v. Montgomery Pass. Co., 167 Pa. 62, 27 L. R. A. 766, 31 Atl. Rep. 468; Paquet v. Mt. Tabor Ry. Co., 18 Oreg. 233, 22 Pac. Rep. 906; Pac. Postal Co. v. Irvine, 49 Fed. Rep. 113; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

[11] People v. Eaton, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. Rep. 145.

[12] Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. Rep. 973.

[13] Chesapeake Tel. Co. v. Mackenzie, 74 Md. 36, 47, 21 Atl. Rep. 690. Accord, see: Montgomery v. Santa Anna Ry. Co., 104 Cal. 186, 25 L. R. A. 654, 37 Pac. Rep. 786; Bloomfield Nat. Gas Co. v. Calkins, 62 N. Y. 386; McDeavitt v. Peoples' Nat. Gas Co., 160 Pa. 367, 28 Atl. Rep. 948; Zehren v. Milwaukee Elec. Co., 99 Wis. 83, 41 L. R. A. 575, 74 N. W. Rep. 538; Blashfield v. Empire State Co., 18 N. Y. Supp. 250.

[14] Cater v. N. W. Tel. Co., 60 Minn. 539, 28 L. R. A. 310, 63 N. W. Rep. 111.

seem to be no sound basis for such a distinction."[15]

Under these divergent views, the decisions are necessarily inconsistent. Where the road is used for an electric or horse railway, it is held that this is only another mode of utilizing the easement for purposes of travel, and no additional burden is thereby imposed, the court saying, "It was not actually contemplated by any of the parties to the acquisition and grant, that it would be used for a passenger railway, yet it may be said to have been within the legal contemplation of all that it was to be used for all purposes by which the object of its creation as a public highway could be promoted. The parties looked to the future, to 'forever'—if the company should last so long—as well as to the then present, and it cannot be supposed that the authors of its existence intended otherwise than that it should respond to whatever demands new improvements and increased facilities might make upon it, so only that such demands must be always consistent with its character and purpose as a public highway."[16] Even a steam railway has been thought not to impose a new servitude upon a country highway,[17] but this view is probably the exception, not the rule, since the steam railroad is almost universally held to employ the highway for a purpose inconsistent with its use as a means for ordinary travel.

The interurban electric railway presents novel questions, as it is usually intended for through traffic rather than for local convenience, and yet it does not seriously interfere with the use of the road for customary modes of passage. By the weight of authority, an interurban railway is deemed to impose a new burden upon a country highway.[18]

Where, in using a highway, there is no actual and perceptible passage along its surface, the theory, requiring the element of motion, denies all right to employ the road without rendering compensation to the abutter. Hence the courts have considered that gas pipes[19] and sewers[20] laid along a country road, create a new servitude. So, also, electric poles used in lighting the highway or adjacent premises, are held to be an additional burden, because they appropriate a part of the surface by a substantial physical structure.[21] Opinions regarding the right to erect telegraph or telephone poles along rural roads are various. By the prevailing view, such structures are deemed additional impositions, either for the reason that the operation of the lines is not designed to promote the health, safety or especial benefit of the communities through which they extend,[22] or because a part of the highway is permanently appropriated for a use not incidental to travel.[23]

The present state of the law, according to the majority of the decisions, is this: the uses to which country thoroughfares may be put are limited by the purposes of the original grant or dedication; the scope of that grant or dedication is to afford a way solely for passage by actual motion. It is submitted that this is too narrow a conception of a rural highway. To say that the present use of streets and roads is to be measured by the

[15] Western Union Tel. Co. v. Williams, 86 Va. 696, 8 L. R. A. 429, 11 S. E. Rep. 106.

[16] Peddicord v. Balt. Pass. Co., 34 Md. 463, 478, 481. Accord, see: Borden v. Atl. Elec. Ry., 33 Atl. Rep. 276; Ehret v. Camden Ry. Co., 46 Atl. Rep. 578, 60 N. J. Eq. 246; Pa. Ry. Co. v. Montgomery Co., 3 Pa. Dist. Rep. 58; Heilman v. Ry. Co., 145 Pa. 23, 23 Atl. Rep. 389.

[17] Paquet v. Mt. Tabor Ry. Co., 18 Oreg. 233, 22 Pac. Rep. 906; Edwardsville R. R. Co. v. Sawyer, 92 Ill. 377.

[18] Pa. Co. v. Montgomery Co., 167 Pa. 62, 27 L. R. A. 766, 31 Atl. Rep. 468; Zehren v. Milwaukee Co., 99 Wis. 83, 41 L. R. A. 575, 74 N. W. Rep. 538; Schaaf v. Cleveland R. Co., 66 Ohio St. 215, 64 N. E. Rep. 145; Thompson v. Traction Co., 181 Pa. 131, 37 Atl. Rep. 205; Chicago Co. v. Milwaukee Co., 95 Wis. 561, 37 L. R. A. 856, 70 N. W. Rep. 678. Contra, see: County of Floyd v. Rome R. Co., 77 Ga. 614, 3 S. E. Rep. 3; Borden v. Atl. Elec. Co., 33 Atl. Rep. 276; Ehret v. Camden Ry. Co., 46 Atl. Rep. 578, 60 N. J. Eq. 246; Southern R. Co. v. Atl. Co., 111 Ga. 679, 51 L. R. A. 114, 36 S. E. Rep. 876.

[19] Bloomfield Gas Co. v. Calkins, 62 N. Y. 386; Sterling's Appeal, 111 Pa. 35, 40, 2 Atl. Rep. 105; Kincaid v. Indianapolis Gas Co., 124 Ind. 577, 8 L. R. A. 602, 24 N. E. Rep. 1066; Consumers' Gas Co. v. Huntsinger, 14 Ind. App. 156, 42 N. E. Rep. 640.

[20] Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. Rep. 973.

[21] Palmer v. Larchmount Elec. Co., 6 App. Div. Rep. 12; Haverford Elec. Co. v. Hart, 1 Pa. Dist. Rep. 571.

[22] Blashfield v. Empire State Tel. Co., 18 N. Y. Supp. 250.

[23] Eels v. Amer. Tel. Co., 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. Rep. 202; Palmer v. Larchmount Elec. Co., 158 N. Y. 231, 43 L. R. A. 672, 52 N. E. Rep. 1092; Postal Co. v. Eaton, 170 Ill. 513, 39 L. R. A. 722; Western Union Tel. Co. v. Williams, 86 Va. 696, 8 L. R. A. 429, 11 S. E. Rep. 106; Pac. Postal Tel. Co. v. Irvine, 49 Fed. Rep. 113; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507. Contra: See Cater v. N. W. Tel. Co., 60 Minn. 539, 28 L. R. A. 310, 63 N. W. Rep. 111; People v. Eaton, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. Rep. 145

original dedication and appropriation, and then to permit sewers, gas pipes and telephone poles to be placed in and upon the highways of cities, but not in the country, is to resort to a mere fiction and declare that the original owner of the fee in the city presumably had these urban servitudes in mind when he devoted his land to public uses, but the farmer possessed no such prescience. Instead of hiding behind this artificial theory, unsupported by and inconsistent with the facts, it is better to face the matter squarely, and say that the purpose of the appropriation in a city was to afford a means for travel, as the term "highway" indicates. Subsequently, when new and unanticipated needs arose, from increased population and advancing civilization, it was found necessary to lay sewers, gas and water pipes and to build street car lines *somewhere*, for the benefit of the public. Should these structures be laid upon private grounds, already occupied, perchance, for other purposes, due compensation being rendered to those whose land was thus taken? Or should they be constructed along the highways, which, though originally intended for no such uses, might conveniently be employed without materially interfering with the real object of their existence, viz., travel? The highway was the most available location for the new structures. A new burden was thereby imposed, but the actual damage was not great and was fully compensated by the incidental benefits to the abutter, which the new use afforded him as a member of the public and as an individual who could avail himself of the sewer, the gas, or water mains, thus adding to the comfort of his occupation of the adjoining land.

There is no fundamental reason why the dedication of a road is more restricted than that of a street. They are both intended primarily, and in the first instance, as a means for communication by travel. If, as civilization advances and the public needs increase, it becomes desirable that farmers should enjoy the conveniences of the telephone, the hot water heating system, gas or sewer connections, or communication by electric railway lines, there is no greater injustice in allowing the imposition of these new burdens upon the rural highway, if it be the most available place for their location, than there is in subjecting streets to the same servitudes, provided the new use may fairly be said to constitute a local convenience. If the sewer does not drain the lands along the highway, but is built for the benefit of distant tracts only, there is a burden imposed, without corresponding advantage to the abutter.[24] But if every abutting owner may avail himself of the privilege, by paying a fair return for the connection, the benefit to the community and to him may be regarded as equivalent to the burden imposed upon his land;[25] and if the rural highway should afterwards be changed into a city street, by the application of the same theory the advantage derived by the abutters from incorporation compensates them for the urban servitudes to which their land will be subjected.[26]

This doctrine, as applied to city streets, has been expressly recognized. "If the city abridges (the owner's) control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas and the like. The disturbance of the owner's control over the subsurface of the streets is, in a legal sense, an invasion of his rights, but it is *damnum absque injuria*."[27]

We conclude, that the same rule should govern the new uses to which rural thoroughfares are put, the tests being, first, "is there a local convenience fairly commensurate with the damage inflicted?" Second, "does the new use materially interfere with the primary purpose for which the highway was created, which purpose is, communication by travel?"[28]

HENRY M. DOWLING.

Indianapolis, Indiana.

[24] Van Brunt v. Flatbush, 123 N. Y. 50, 27 N. E. Rep. 973.

[25] Witcher v. Holland Waterworks Co., 66 Hun, 619, affirmed in 142 N. Y. 626.

[26] Huddleston v. Eugene, 34 Oreg. 343, 43 L. R. A. 444, 55 Pac. Rep. 868.

[27] McDeavitt v. People's Gas Co., 160 Pa. 367, 28 Atl. Rep. 948; Bloomfield Gas Co. v. Calkins, 62 N. Y. 386.

[28] See Contra: Schaaf v. Cleveland Ry. Co., 66 Ohio St. 215, 64 N. E. Rep. 145; Haverford Elec. Co. v. Hart, 1 Pa. Dist. Rep. 571.

ATTACHMENT—MOTION TO DISCHARGE.

MARK MEANS TRANSFER COMPANY v. MACKINZIE.

Supreme Court of Idaho, June 10, 1903.

Where it is shown that the suit is based upon a promissory note providing that the express condition of the sale and purchase of the goods for which the note was given is such that the title, ownership, or possession does not pass until the note and interest is paid in full, and that the payee has full power to declare the note due and take possession of the goods at any time he may deem himself insecure, even before the specified maturity of same, unless it is shown by the affidavit that the security is beyond his reach, or has become valueless through no fault of his, attachment cannot be maintained upon action for purchase price.

STOCKSLAGER, J.: This case is here for review on appeal from an order of the district court, Nez Perce county, dissolving and discharging an attachment.

We gather the following facts from the records: On the 2d day of July, 1901, respondent executed and delivered to appellants the following promissory note:

"Lewiston, Idaho, July 2nd, 1901. No. ——.

For value received, on or before the 1st day of Oct., 1901, I promise to pay to the order of Mark Means Transfer Co., of Lewiston, Idaho, at Lewiston, Idaho, in gold coin, $110.00, one hundred ten no-100 dollars with interest at ten per cent. per annum from date until paid.

If suit is brought on this note I also promise to pay a reasonable amount of attorney's fees to the holder of this note. The makers and endorsers consent that suit may be brought on this note before any justice of the peace to the amount of $300. The express condition of the sale and purchase of goods for which this note is given is such that the title, ownership or possession does not pass from the said Mark Means Transfer Co. until this note is paid in full, and that the said Mark Means Transfer Co. have full power to declare this note due and take possession of the goods at any time he may deem himself insecure, even before the specified maturity of same. Given for ——.

Alex Mackinzie."

On the 4th day of August, 1902, appellants filed their complaint in the district court of Nez Perce county, demanding payment, etc. On the 15th day of August, 1902, a writ of attachment was issued by the clerk of the district court of Nez Perce county, and delivered to the sheriff of said county for service, and on the 19th day of August, 1902, the sheriff executed said writ by levying upon certain property of respondent, to wit, one McCormick binder, 15 tons of grain hay, 5 acres of growing onions, and an undivided one-third interest in and to 118 acres of growing flax, all on the farm of respondent in said county of Nez Perce, and placed a keeper in charge of the property attached. The attachment was issued, based upon the affidavit of James Hayes, who, with Mark Means, constitutes the firm of Mark Means Transfer Company. The affidavit follows:

"Affidavit for Attachment. James Hayes, being first duly sworn, deposes and says, that he is one of the plaintiffs named in the above entitled action, and that he makes this affidavit for himself and co-partner, Mark Means; that the above named defendant is indebted to said plaintiffs in the sum of one hundred and ten dollars ($110.00) with interest thereon, at the rate of (10) per cent. per annum, from the second day of July, 1901, and the further sum of twenty-five dollars ($25.00) attorneys' fees, over and above all legal set-offs, and counterclaims, upon a contract for the direct payment of money, to-wit: upon a promissory note, dated July 2, 1901, for the sum of one hundred and ten dollars ($110.00), with interest at ten (10) per cent. per annum, from date thereof, payable on or before the 1st day of October, 1901, and providing for the payment of a reasonable sum as attorneys' fees in case suit or action is instituted to collect the same, or any part thereof, and that the sum of $25.00 is a reasonable attorneys' fee herein; and that the payment of said sums or either of them or any part thereof has not been secured by any mortgage or lien upon real or personal property or any pledge of personal property.

That this attachment is not sought and this action is not prosecuted to hinder, delay or defraud any creditor or creditors of said defendant.

James Hayes.

Subscribed and sworn to before me this 15th day of August, 1902.

P. E. Stookey,
Clerk District Court."

Thereafter respondent gave notice of his intention to ask the court to discharge the attachment on a day certain fixed in the notice, on the ground that the attachment was issued in violation of subdivision 1, § 4303, Rev. St. Idaho, 1887, in this: that the note sued on in this action is a title note, is and was secured by the machinery and property on which the note was given, and that no proceedings have been had to exhaust said security. In support of this motion, the affidavit of Alex Mackinzie, respondent, was filed. Subdivision 1, of section 4303 says: "That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness over and above all legal set-offs or counterclaims, and whether upon a judgment or upon a contract for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or if originally secured that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless," etc. The affidavit of respondent says: "That said note was given for one McCormick binder, was a title note, and under the conditions of the note, agreement and contract, and the express con-

ditions of the sale and purchase of the goods for which said note was given, it was stipulated and agreed that the title, ownership or possession of said property does not pass from the said Mark Means Transfer Company until the note is paid in full, and that the said Mark Means Transfer Company have full power to declare the said note due and take possession of the goods at any time they may deem themselves insecure, even before the specified maturity of the same; that there has been no action or proceeding for the purpose of exhausting said pledged property, and the same is in existence at the present time; and that the said note is, and was at the time this action was commenced, secured, and that said security has not been exhausted." In opposition to this motion the joint affidavit of Mark Means and James Hayes was filed. Each for himself says: "That it is not true that there was any agreement or contract that the ownership or possession of the goods and articles for which the note sued upon was given should remain in plaintiffs; that the note was given only to evidence the indebtedness of Mackinzie to plaintiffs for a McCormick binder, some binding twine, and other articles which were sold and delivered by plaintiffs to said Mackinzie on the 2d day of July, 1901; that, at the time said note was executed and delivered by defendant to plaintiffs, plaintiffs delivered possession of said binder, binding twine, etc., and have not had possession of them, or either of them, since." The affidavit denies that there was any contract or understanding between plaintiffs, or either of them, and defendant, that plaintiffs should have a lien upon said binder, and that the question of lien, ownership or possession of said binder or other property was not discussed, etc. That on the 2d day of July, 1901, defendant appeared at the business place of plaintiffs in the city of Lewiston, and proposed to purchase of them said binder and other personal property, which in all amounted to the sum of $110, provided plaintiffs would wait upon him until the 1st day of October, 1901, for said sum. That plaintiffs accepted said proposition, and then and there delivered said goods to defendant, and then and there the defendant, without any further agreement, contract, or discussion, executed and delivered to plaintiffs the promissory note set out in the complaint in this action. This constitutes the record before us, and the record before the district court upon which the order was made on the 8th day of November, 1902, forever quashing and discharging the attachment.

It is urged by counsel for appellants that the order of the district court does not state on what ground the attachment was quashed and discharged. Counsel for respondent replies that the order was prepared by counsel for appellants, and he should not be heard to complain if the order is defective in this particular. Be this as it may, the order does discharge and quash the attachment, and the application for its discharge is based upon the ground that under the provisions of subdivision 1 of section 4303 of the Revised Statutes of 1887, the plaintiff cannot have an attachment, for the reason that the terms and conditions of the note created a lien on the property sold by appellants to respondent, and, further, that no effort has been made by appellants to exhaust the property covered by such lien before the attachment proceedings.

It is further urged by counsel for appellants that the statute of this state does not provide for a lien of the kind and character shown by the note which is set out *hæc verba* in the statement of the facts in the opinion, and further urge that a pen was drawn through the blanks left for description of the property, which would and did destroy the lien if the statute does authorize such a one as contemplated by the promissory note in question.

Counsel for appellants also urge that there are but two kinds of liens of personal property, viz., a chattel mortage and a pledge. That it is not a pledge, because possession of the property was not delivered to or retained by appellants.

In support of his contention that appellants had a lien on the machinery sold to respondent by them by reason of the terms of the note, counsel for respondent recites Willman v. Freidman, 35 Pac. Rep. 37, decided by this court. He quotes the following language from that opinion: "Where W. sold to F. certain real estate upon executory contract, F. going into possession, but title remaining in W. until purchase price is paid by vendee, vendor has such a lien as bars him from resorting to attachment under the statutes of Idaho for the recovery of unpaid portion of purchase price." Does a reservation of the title in the vendor create such a lien in his favor as to disbar him from invoking the remedy by attachment under our statutes? Why was the title to this real estate reserved in the plaintiffs? Defendant went into possession under the contract, and made partial payments of the purchase price. If the reservation of title in the plaintiffs was not for the purpose of security, we cannot imagine what it was for. If it was not a vendor's lien in the strict sense of that term, it was security by lien upon real estate, and while it continued to exist, constituted a bar to the issuance of an attachment under the provisions of section 4303, Rev. St. Idaho, 1887, unless it had, without any act of the plaintiffs or the person to whom the security was given, become valueless.

The case of Harkness v. Russell, reported in 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. Ed. 285, is very interesting and instructive on the question of sales of the character before us. The opinion is by Mr. Justice Bradley, and reviews the decisions of many of the American courts. The opinion closes in this language: "It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent in this case the operation of the general rule, which we consider to be established by overwhelming authority, namely, that in the absence of fraud an agreement

for a conditional sale is good and valid as well against third persons as against the parties to the transaction, and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

Our attention is also called to Barrett v. Pritchard, 2 Pick. 512, 13 Am. Dec. 449, 1 Benj. on Sales (3d Eng. Ed.), § 334, and Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318, in support of the proposition that the condition of the note created such a lien on the machinery as precluded the appellants from attachment proceedings until the property conveyed by the lien had been exhausted, or that it was shown by the affidavit for attachment that the property, through no fault of plaintiffs, could not be reached, or had become valueless.

We have carefully examined the authorities cited by counsel for appellents, but do not think they can apply to the case atbar. There is a conflict in the evidence as to what was said between the parties at the time of the sale of the machinery, but there is no dispute as to the language of the note, its terms and conditions, and, the district judge having passed upon the evidence before him, we think his conclusions were justified and should not be disturbed.

We do not attach particular importance to the fact that a line was drawn through the blank space in the note for a description of the property. The language of the note creates the lien on the property sold, and a description of it was not essential. We think appellants could have taken the machinery from respondent under the terms of the note, disposed of it in any manner they saw fit, and respondent could not be heard to complain.

Order affirmed with costs to respondent.

Per Curiam. Attorneys for appellants have filed a very interesting and able petition for rehearing in this case, but, after consideration of the reasons urged and the authorities cited in support thereof, we feel it our duty to adhere to the conclusions announced in the opinion originally filed herein.

Appellants contend that since the sale was conditional, and the title was, by the terms of the contract, not to vest in the vendee until full payment should be made, the vendor could waive the conditions and thereby vest title in the vendee, and that the commencement of an action to recover the purchase price was an implied waiver of such conditions. This proposition seems to be fully supported by the authorities to which we are cited by the appellants. 2 Benjamin on Sales, p. 550; Tiffany on Sales, p. 158; Holt Manufacturing Co. v. Ewing (Cal.), Rep. 42 Pac. 435; Detroit H. & L. Co. v. Stevens (Utah), 52 Pac. Rep. 379; Fowler v. Bowery Savings Bank (N. Y.), 21 N. E. Rep. 172, 4 L. R. A. 145, 10 Am. St. Rep. 489; Parke & Lacy Co. v. White River Lumber Co. (Cal.), 35 Pac. Rep. 442; Smith v. Barber, 53 N. E. Rep. 1014; Bailey v. Hervey, 135 Mass. 174. Upon principle, a vendor who sells personal property, reserving in himself the title and right of possession, should be deemed to have waived his right to repossess himself of the property whenever he commences an action for the recovery of the purchase price. The reservation of title is a protection for the vendor alone, and enables him to pursue the property in case the purchase price shall not be paid when due. This right he may forego if he chooses to do so. The vendee, on the other hand has unqualifiedly obligated himself to pay the purchase price, and has likewise agreed that the title to the property shall remain in the vendor as security for the amount unpaid. There is nothing for the vendee to waive and he can suffer no injury by reason of any waiver made by his creditor. Certainly a vendor could not recover a judgemnt for the purchase price of his goods and still retain the title to the goods and right to recover them.

The question here presented is: Can the vendor, after commencing his action for a recovery of the balance of the purchase price, have an attachment issued thereon against the property of the vendee? Section 4303, Rev. St. 1887, requires the plaintiff to make and file an affidavit with the clerk before he can have a writ of attachment issued, and it is there required, *inter alia*, that the affidavit shall set forth "that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or if originally secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." Keeping this statute in view, was the debt originally secured? And, if so had the security become valueless without any act of the plaintiffs? The debt was, so far as defendant is concerned, unalterably and unqualifiedly contracted when the conditional sale contract was entered into, and at that time the plaintiffs contracted with defendant for the right to retake the property. This right was undoubtedly a "security" to the plaintiffs. When they waived the conditions of the sale and passed title to the defendant, they certainly waived this security by their own act. We do not see how a creditor can make the required affidavit under these conditions, unless, in fact, the property has been destroyed, consumed, worn out, or otherwise become "valueless without any act of plaintiff."

It is urged by appellants that they had no "security" for their debt as contemplated by our statute; that it was not a mortgage, and was not a lien, and not a pledge. It occurs to us that plaintiffs' security was a higher class of security than either a mortgage, lien or pledge; it was a reservation of the title itself, with a right to take possession at any time condition should be broken. Here the creditor held a security for the sum owed him from his debtor which did not require any processes of law to divest the title. All that was necessary for him to do in order to realize on

his security was to obtain possession of the property. This we think clearly a security within both the letter and spirit of the attachment statute *supra* and that the plaintiff could not abandon such security, because, perchance, he preferred an attachment lien to the security he already had.

A rehearing is denied.

NOTE.—*In Attachment Proceedings Statute Must be Strictly Complied With.* — The decision in the principal case was no doubt right, when it is remembered that "attachment is essentially a creature of statute, and as the proceeding involves the involuntary dispossession of the owner and antagonizes the common-law idea of proprietary right, the statutes are strictly construed, and to confer jurisdiction it must affirmatively appear on the record that all the requirements of statute have been complied with; otherwise the proceedings are extra judicial and the judgment can be impeached collaterally." 1 Am. & Eng. Ency. of Law, 894, citing Drake on Attachments, secs. 1, 2, and 3. Or, as was said by the Supreme Court of Ohio: "Attachments being statutory, and, nearly *ex parte*, and not according to the course of common law, ought not to be extended beyond the letter of the statute." Collwell v. Bank, 2 Ohio, 229; Taylor v. McDonell, 4 Ohio, 149, 155.

In the following states a strict construction is given to attachment statutes: Roberts v. Landaker, 9 Cal. 262; Hayward v. Collins, 60 Ill. 328; Frellson v. Stewart, 14 La. 832; Pool v. Webster, 60 Ky. 278; Shockley v. Bullock, 18 Ga. 283; McPherson v. Snowden, 19 Md. 197; Solinger v. Patric, 7 Daly, 408; Rankin v. Dulaney, 43 Miss. 197; Wooster v. McGee, 1 Tex. 17; Musgrove v. Brady, 1 Morris (Iowa), 456; Jaffrey v. Jennings, 101 Mich. 515; Calwell v. Sibley, 3 Minn. 406; Barksdale v. Henbree, 2 Pac. & H. (Va.) 43; Elliott v. Jackson, 3 Wis. 649. A more liberal construction has been given in the following: Bank v. St. John, 25 Ala. 566; Vance v. Cooper, 42 Tenn. 497; Hannibal Railroad v. Crane, 102 Ill. 249; Strock v. Little, 45 Pa. St. 416; Bank v. Conry, 28 Miss. 667; Thompson v. Eastburn, 16 N. J. 100.

Under the Idaho statute, the attaching creditor must make affidavit "that the payment of the debt has not been secured by any mortgage or lien upon real or personal property, or that if such security has been given, without any fault of the creditor, it has become valueless," and while the consideration of the note upon which suit was brought, was for the sale of a machine, upon which it was agreed that until the note was paid in full the plaintiff might take possession of the machine, etc., yet the plaintiff contended that this debt was not secured, etc., within the meaning of the statute. The court in its opinion practically admits that within the exact words of the statute this was not a security by mortgage or lien, etc., but that it was a higher class than either a lien mortgage or pledge; that it was a reservation of title. It was the holding of the right of possession if the note was not paid. A liberal construction here would surely have led the court to the opposite conclusion, and that the note was not secured. But when the probable intention of this Idaho statute is considered, *i. e.*, to-wit, that no attachment shall issue where a debt is secured, until the security is exhausted or becomes valueless, or where there is property that can be applied on payment of the debt, that such property must be so applied, and that if the creditor has security he must exhaust it, before he can annoy the debtor with the extraordinary proceedings of attachment, then the decision of the court can be sustained.

Conditional Sales, Waiver of Lien.—Another question presented in the principal case is whether the creditor could not waive his right to possession and title to the machine sold, and then make the required affidavit that he had no lien, etc., and whether when he commenced his action and sought a recovery on the note, that fact itself did not constitute a waiver, and divest him of his titulary rights. Thus in Holt Manufacturing Co. v. Ewing, 42 Pac. Rep. (Cal. 1895), where a corporation delivered to E a machine, taking his note, and also a contract providing that the company did not part with the title until the notes were fully paid; that should Ewing make default in any of the payments, the company might terminate the contract, and take the machine, and that all payments prior to such default should be compensation for its use. After default by Ewing he died, and the company presented to his administratrix its claim upon the notes, and the claim was allowed; it was held that the company received its right to retake the machine and elected to treat the transaction as an absolute sale. In the opinion of this case, it is said: "There are many cases cited by appellant to the effect that bringing an action for recovery of a demand under like circumstances is such an election as debars the creditor from recovering the property under the claim that the title had passed. That proposition is so well settled that these cases need not be cited; the only question being whether the presentation of the claim and its allowance was such election."

In Smith v. Barber, 53 N. E. Rep. 1014 (Ind. 1899), it is held that an action for the price of property sold under a conditional sale, evidences vendor's election to treat the sale as absolute, and that under a contract of sale of personal property, which stipulates that the title shall remain in the vendor until fully paid for, that the vendor, upon default by the vendee to pay the purchase price according to agreement, may elect to retake the property or treat the sale as absolute, and sue for the price, and to sustain this proposition, the following cases are cited: Crompton v. Beach, 92 Conn. 25; Parke v. White River Co., 101 Cal. 37; Manufacturing Co. v. Ewing, 109 Cal. 353; Bailey v. Hervy, 135 Mass. 172; Bank v. Thomas, 69 Tex. 237; McRea v. Merrifield, 48 Ark. 160; Heller v. Elliott 45 N. J. L. 564; Bulton v. Trader, 75 Mich. 295; Seanor v. McLaughlin, 165 Pa. St. 150.

The decision of the principal case was made, fully cognizant of this view, and here comes in one of the principal difficulties that the court, no doubt found in arriving at its conclusion. If the beginning of an action is a waiver of the right to retake the property, a surrender of the creditor's title, then it logically follows his lien thereon is gone, and the only way he can have it applied on his debt, is by the ordinary processes of law that can be made to apply to any property not so held by him. If, when he commenced his action, he waived his lien, then he has no security, and if he has no security he surely could have made the affidavit required by the Idaho statute. The only way this is avoided, is by the court denying the right of the creditor to waive this security, and treating it in the light it was considered when the contract was originally made.

See 29 Cent. L. J. 26, Rights of parties where seller retains the title as security; 51 Cent. L. J. 248, Vendor can not sue vendee, if he has retaken property; 19 Cent. L. J. 4, That change of possession destroys

lien; 24 Cent. L. J.: Attachment laid on goods, waiver of right of stoppage in *transitu*; 44 Cent. L. J. 517, Recent decisions on recovery of money paid by vendee on rescission of sale.

JETSAM AND FLOTSAM.

LEADING EXAMPLES OF THE BAR OF EARLY ARKANSAS.

Nothing is so interesting to a true lawyer, and nothing, indeed, quite so profitable, as a careful study of the lives of former leaders of the bar, and a critical comparison of the many and various methods by which they achieved success. Nothing so attractive in this line has come to our attention for some time as the sparking, tin-type word photographs of some of the giants of the bar of early Arkansas, with which Hon. George B. Rose, president of the Arkansas Bar Association, embellished a recent address. We have culled these gems from the copy of this address, which he has been so kind as to send us, and present them for the edification and entertainment of our readers everywhere.

ABSOLOM FOWLER.

One of the strongest lawyers that was ever at this or any other bar was Absolom Fowler. Born at Murfreesboro, Tenn., of obscure parents about the year 1802, he was reared in poverty, and is said to have walked to Little Rock.

They say that in his younger days he was of a genial disposition and that he was deservedly popular. But he made some unfortunate investments which brought upon him a load of debt that would have crushed a weaker man. Too proud to take the benefit of the bankrupt act, he toiled on, finally paying all that he owed and leaving a considerable estate. But in the meantime he became soured and envenomed. In his practice he was utterly remorseless. He was, perhaps, unrivaled in his mastery of the technicalities of common-law pleading, and he had no mercy on his adversary. In debate he was combative and vigorous to the highest degree, breaking down opposition by sheer strength. By nature a military man, he should have been a soldier. He had all a soldier's qualities. He was bold, defiant, resolute, prompt to decide, quick yet wary in action, always aggressive, always driving his adversary before him. Loving no one, he was a solitary man, and his solitude was devoted to study. He was deeply read in history and politics, and prodigiously in the law. In debate he was sarcastic and bitter, and often gave deep offense. He had few friends. He took no pleasure save in his work, for which his power was enormous. He was never idle. If in court he had a moment's leisure he would pick up the first law-book at hand and begin to make notes.

In 1859 he died as he lived, with but few friends, and was buried in Mount Holly Cemetery; but though he left a widow and, as I have said, a considerable estate, no stone was erected to his memory. With considerable difficulty I found his grave, and caused it to be marked by a plain marble slab, so that the spot may not be forgotten when the time arrives for the erection of suitable monuments to the memory of our illustrious dead.

GEORGE C. WATKINS.

George C. Watkins was born at Shelbyville, Ky., on November 25, 1815. He was one of the frailest looking men that ever lived, weighing less than one hundred pounds, though of medium height. It looked as though a zephyr would blow him away; yet his capacity for labor was enormous. With his frail physique and feeble voice he preferred the chancery practice' in which he became eminent. He had a fine legal mind, one that despised technicalities and looked to justice and reason. At the earnest solicitation of the bar he became chief justice for two years, and never was there a greater slaughter of foolish precedents. All the most absurdly technical decisions of his predecessors were overruled, and our jurisprudence put upon a sound basis. And it is noteworthy that before the civil war, at a time when the jurisdiction of the state over navigable rivers within their borders was generally conceded, he demonstrated the necessity of the exclusive jurisdiction of the federal tribunals in an opinion that will compare favorably with that which Justice Miller rendered after the issue of the conflict had strengthened the hands of the nation.

Though delicate, refined and shrinking as a woman, he had admirable business judgment, and but for the civil war, he would have left a million. As it was, his estate was large. He died of consumption brought on by overwork, on the 7th of December, 1872.

JOHN TAYLOR.

Those of you who have looked through the early volumes of our reports must have noted how frequently the name of Taylor appears as counsel. John Taylor was only a sojourner in Arkansas from 1837 to 1844, but he was so remarkable a man that he should not be forgotten. Albert Pike, who had heard all the great orators of our country, declared that Taylor had a command of language surpassing anyone that he had ever known. Everybody who heard him agreed that in capacity for invective, for withering, blasting, envenomed eloquence, he excelled any human being that ever spoke, and that he seemed possessed of a demonic power.

He was a tall, lank, red-haired man, repulsively ugly, with little green eyes that glistened like those of a snake, and with a fashion of licking out his tongue that was strangely serpentine. He talked to no one save on business. When he settled in Little Rock, whither he had come from Alabama, after he had been defeated in his candidacy for the United States senate, all the bar called on him; but he received them with repelling coldness, and returned no visits. He had a wife, but nobody ever saw her—a wonderful thing considering the small size of Little Rock at the time. During the seven years of his sojourn he never crossed any man's threshhold, and no man crossed his. In riding the circuit he always rode alone, permitting no companionship, and while in attendance on court he would, if the weather permitted, live in a tent pitched in the neighboring wood, where he might not have to look on the hated face of his fellow-man. Yet this modern Timon, a thousand times more embittered and malignant than he of Athens, was a devout Christian, assiduous in his attendance at church, and always speaking with intense religious conviction. But his strange, invisible wife did not appear even on the Sabbath.

As a lawyer he was a terror. His knowledge of law was prodigious, and his memory of authorities almost superhuman. He could write out any of the long, verbose, involved common-law pleadings word for word as they appeared in Chitty without looking at a book. He was a master of every technicality by which his adversary could be humiliated and overthrown, and when he arose to speak none could resist the fierce torrent of his fiery eloquence. He spared no one and feared no one; but while he never suggested a resort to personal violence, he always

carried two pistols in the pockets of his long black coat, in readiness to repel any attack.

He must have had a streak of insanity in him, for when he left for Texas he assigned as a reason that the Little Rock lawyers had poisoned his well.

In 1855 he reappeared one day in our supreme court, much aged, but still erect, proud, scornful, and malignant, and after looking around on such of his old opponents as survived, departed without speaking to anyone, and went forth upon his lonely way, whither no man knew.

ALBERT PIKE.

In all this brilliant galaxy Albert Pike was conspicuous, and perhaps pre-eminent. He had talents that would have enabled him to do anything on which he might concentrate his energies; talents which, unhappily, were not always husbanded, or concentrated on any definite purpose.

Had he remained in his native Boston, where he was born on December 29, 1809, he would probably have become one of the greatest ornaments of our literature. His "Hymns to the Gods," which were first published in Blackwood's Magazine when he was little more than a boy, will bear comparison with any poetry written at the same age; but the west was uncongenial to poetic inspiration, and here his poetic talent, dissipated in prosaic pursuits and a variety of studies, only flashed forth occasionally, and showed as he grew older a downward rather than an upward tendency.

It is doubtful whether a man ever lived who was possessed of greater personal advantages. Above the medium height, perfectly formed, with dark hair that fell in graceful waves about his shoulders, and features that might have been cut by a Grecian chisel, he looked in his youth like a reincarnation of Apollo.

After wanderings among the wilds of New Mexico, Texas, and the Indian Territory, he came to Arkansas in 1832, and began the study of the law while teaching school.

Soon he was admitted to the bar, and rapidly advanced to the front rank. An enormous reader of books of every sort, a fluent and persuasive speaker, though not a fervid orator, he wielded the pen with a skill that was unrivaled among his professional brethren, and not often surpassed by any of his contemporaries. His practice became very great, and was extremely lucrative; for there was something so princely in the bearing of the man that a client could not offer him a paltry sum. He received a single fee of $160,000, the largest ever paid in the state, and at that time almost unexampled in the country; but his tastes were extravagant and his manner of living so hospitable and so splendid that his income was none too large. He was an exquisite epicure, requiring the daintiest of viands and the rarest of wines; both of which he consumed in great quantities, without injury to his magnificent constitution. He was always doing startling things. For example, he once rode the circuit attended by a fine brass band, which he brought along to play for him in the evening. Again, he carried a cannon to shoot ducks in the Indian Territory, and the fact that he slaughtered vast quantities of the birds justified the choice of his singular weapon, though this wholesale method would not be approved by the modern sportsman.

To do justice to his varied career would require far more space than I have at my command; and fortunately it is a matter of public history.

After the war he left us, and settled in Washington, where he died; and a handsome public monument has been erected to his memory in one of the squares of that city.

Pike, as I have said, was always a prodigious and omnivorous reader. Few have come so near to the popular conception of a man who has "read everything." After his removal to Washington City, he gradually withdrew from the practice of the law, to devote himself to the study of masonry. Though he admitted masonry to be of modern origin, he believed that it had borrowed much from the writings of antiquity. In the course of his researches he sought light from the literatures of ancient Persia and India, and became an accomplished Persian and Sanskrit scholar. He made complete translations of the Zend 'Avesta and of the Vedic hymns, which remain in twenty-two volumes of manuscript, written in his clear and beautiful hand. It is a work which could not be published with profit, but whose publication would be a boon to those interested in the subject; for it is safe to say that no version of equal elegance has yet been made. Pike's devotion was flattering to the pride of the masonic fraternity, and he developed his theories with a wealth of learning and a literary skill that were perhaps without example. It is doubtful whether any man ever stood higher or so high in the esteem of that order.

CONCLUSION.

The time at my command limits my discourse to the lawyers of an early day who lived in Little Rock, but who practiced in the courts of nearly every county in the state; and I have confined myself to those who were most distinguished in their profession, those whose names most frequently appear in our old reports of decided cases. In those days Fort Smith, Van Buren, Clarksville, Fayetteville, Batesville, Helena, Pine Bluff, Camden, Arkadelphia, and Washington were legal centers, in which the bar was represented by men of learning and indefatigable industry, men well worthy of being remembered. The leaders of the bar rode their circuits regularly in the English fashion; and most of their learning came from Westminster Hall, treasured up in well seasoned and orthodox volumes, whose well-thumbed pages showed that they were kept for use and not for display. It is not, however, solely the lack of time that prevents me from referring to the leaders of these local bars, formerly well-known throughout the state, and whose fame grows dim with the flight of years; for indeed, I have not the information which would enable me to delineate their traits of character or to trace their careers. That task must be left to others, whose opportunities for reviving the local histories possess an enviable superiority over any at my command. I must close this inadequate discourse with the hope that I may have done something to arouse in you an interest in our illustrious predecessors, and that abler voices than mine may yet be found to rescue the memory of their virtues and their deeds from the "tooth of time and rasure of oblivion."

BOOKS RECEIVED.

The Trial Lawyers' Assistant in Civil Cases. By Henry Hardwicke, member of the New York Bar. Author of "The Art of Winning Cases," or Modern Advocacy, "History of Oratory and Orators," "The Art of Getting Rich," "The Trial Lawyers' Assistant in Criminal Cases," etc. Banks & Company, Albany, N. Y. Sheep, pp. 800. Price, $6.00. Review will follow.

The Trial Lawyers' Assistant in Criminal Cases. By Henry Hardwicke, member of the New York Bar. Banks & Company, Albany, N. Y., 1902. Buckram, pp. 308. Price, $2.50. Review will follow.

HUMOR OF THE LAW.

Professor: "What early proceeding in ouster do we find in British history?"

Student: "I don't know, sir, unless it's the case in which the snakes were ejected from Ireland."

In a recent will lately presented for probate in Chicago, the testator declares: "Of this, my last will and testament, I make, constitute, and appoint Harry S.—, of Dunning street, to be executed."

"Pa," said Johnny, who is a persistent knowledge-seeker, "what is a law-giver?"

"There isn't any such thing, Johnny," replied the old gentleman, who had been involvod in considerable litigation in his time.

"But this book says that somebody was a great law-giver," persisted the youngster.

"Then it's a mistake," rejoined his father. "Law is never given; it's retailed in very small quantities at very high figures."

Dere's qveerish dings von finds in law,
Und von qveer von is dis,
Dot a *bicycle's a vheelbarrow*
(Or *ejusdem generis.*)

Or if von sits on conscrewed vires
(In de normal course of dings),
Den de bike ish *not* a barrow,
Boot a "*carriage hoong on shprings!*"

Und *Mayhew versus Sutton* says—
To de modorist's deshpair—
Dey're endanshering de pooblic
Ven de pooblic ish not dere!

Dere ish mooch visdoms in der law,
Boot somedimes I dink dis—
Der law is mit der Balaam's Ass
Ejusdem generis!

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE — Proofs of Loss. — Repudiation of any liability held to excuse failure to furnish proofs of death within two months. — Cole v. Preferred Acc. Ins. Co., 81 N. Y. Supp. 901.

2. ACCORD AND SATISFACTION — Liquidated Demand.—Where, under an insurance policy, one has a liquidated lawful demand against the company, the surrender of the policy and acceptance of a less sum held not an accord and satisfaction.—Simons v. Supreme Council, A. L. H., 81 N. Y. Supp. 1014.

3. ACCORD AND SATISFACTION — Receipt. —A written instrument signed by an employee held a receipt, and not conclusive evidence of an accord and satisfaction.—Komp v. Raymond, N. Y., 67 N. E. Rep. 113.

4. ACTION — Stay of Proceedings.—Where, in partition, was shown that a third party had an interest in the roperty, it was the duty of the court to stay the proceedings and require him to be made a defendant.—Latham v. Tombs, Tex., 73 S. W. Rep. 1060.

5. ALIENS — Deportation. — Federal courts will not intervene by *habeas corpus* to prevent the deportation of an alien found to be one of the excluded class, after notice of investigation under Act Oct. 19, 1888, ch. 1210, 25 Stat. 566 (U. S. Comp. St. 1901, p. 1294), and Act March 3, 1891, ch. 551, 26 Stat. 1085 (U. S. Comp. St. 1901, p. 1294).—Kaoru Yamataya v. Fisher, U. S. S. C., 23 Sup. Ct. Rep. 611.

6. APPEAL AND ERROR —Academic Case. — A writ of error to judgment of state court in a suit for usurpation of public office dismissed, where terms of office of all the parties have expired.—State of Tennessee v. Condon, U. S. S. C., 23 Sup. Ct. Rep. 579.

7. APPEAL AND ERROR — Briefs. —It is improper to file in the supreme court the brief and argument filed in the appellate court, with a new cover and an addendum criticising the opinion of the appellate court.—McArthur Bros. Co. v. Whitney, Ill., 67 N. E. Rep. 163.

8. APPEAL AND ERROR—Judgment. — A party availing himself of a judgment or decree by coercing its payment is in general held to affirm its correctness, and has no right of appeal.—Whetstone v. McQueen, Ala., 34 So. Rep. 229.

9. APPEAL AND ERROR—Pleading.— In action against a sheriff for taking insolvent sureties on forthcoming bond, failure to allege that the attachment was sustained held not remediable by filing on appeal a copy of an order sustaining the attachment.—Edwards-Barnard Co. v. Pflanz, Ky., 73 S. W. Rep. 1018.

10. APPEAL AND ERROR— Private Land Claims.—Finding of the court of private land claims that evidence as to occupation of tract purported to have been granted is almost wholly wanting, will be adopted on appeal by the Supreme Court of the United States. — Sena v. United States, U. S. S. C., 23 Sup. Ct. Rep. 596.

11. APPEARANCE—Service of Process.—The prosecution of a writ of error from a judgment entered without jurisdiction is a general appearance, when the cause is remanded to the court below. — Drew Lumber Co. v. Walter, Fla., 34 So. Rep. 244.

12. ASSAULT AND BATTERY — Possession of Property. Where defendant allowed an agent to take peaceable possession of a sewing machine, and then assaulted such agent, evidence as to the terms of the contract in reference to the possession of such machine was immaterial. —Lockland v. State, Tex., 73 S. W. Rep. 1054.

13. ASSAULT AND BATTERY—Self-Defense.—Where one by abuse provokes another, so that the latter attacks him, and the former injures the attacking party, the defense of self-defense is not available. — Shaw v. State, Tex., 73 S. W. Rep. 1046.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS — Validity.—A deed of assignment is not void because of a provision authorizing the assignee, out of the proceeds, to pay the expenses of the assignment. — Armour v. Doig, Fla., 34 So. Rep. 249.

15. ATTACHMENT—Vendee's Credit Injured.—Injury to vendee's credit, resulting from attachment suits, held not elements of damage recoverable in suits on the attachment bonds.—Fidelity & Deposit Co. of Maryland v. L. Bucki & Son Lumber Co., U. S. S. C., 23 Sup. Ct. Rep. 582.

16. BAILMENT—Attachment.—A bailee of third persons can recover possession of the property as against the levy of an attachment running against her husband. — Vermillion v. Parsons, Mo., 73 S. W. Rep. 994.

17. BANKRUPTCY—Preference.—In a bankruptcy trustee's action to avoid a preference, it is proper to show that defendant's attorney was present when the bankruptcy proceedings were had, as showing notice thereof. — Calkins v. Farmers' and Mechanics' Bank, Mo., 73 S. W. Rep. 1098.

18. BANKS AND BANKING — Checks. — A delivery of a check on a bank deposit operates as an assignment *pro tanto* of the deposit, and renders the bank liable to pay the same on presentment, if the drawer's funds in its hands at the time are sufficient. — Brown v. Schintz, Ill., 67 N. E. Rep. 172.

19. BANKS AND BANKING — When Pledgee Liable as Owner.—A pledgee of national bank stock taken as collateral held not chargeable with personal liability for the debts of the bank imposed on shareholders by Rev. St. U. S. § 5151 (U. S. Comp. St. 1901, p. 3465). — Rankin v. Fidelity Ins. Trust & Safe Deposit Co., U. S. S. C., 23 Sup. Ct. Rep. 553.

20. BENEFIT SOCIETIES — Vested Rights. — Beneficiary under benefit insurance policy held to have no vested rights until death of insured.—Pollak v. Supreme Council of Royal Arcanum, 81 N. Y. Supp. 942.

21. BILLS AND NOTES—Action by Assignee. — Defendant in an action on a note cannot complain because the court permitted the note sued on to be indorsed during the trial in accordance with a previous assignment made to plaintiff. — Vinson v. Palmer, Fla., 34 So. Rep. 276.

22. BILLS AND NOTES — Forged Indorsement. — One cashing a check on a forged indorsement held liable to the true owner. — Meyer v. Chas. Rosenheim & Co., Ky., 73 S. W. Rep. 1129.

23. BROKERS — Commissions. — Where a principal told her broker that the title to property intrusted to him was good, she cannot evade payment of commissions to him by proof of a lien on the property.—Smye v. Groesbeck, Tex., 73 S. W. Rep. 972.

24. BURGLARY — Ownership of Property. — Temporary ownership or actual care and control of stolen property constitutes ownership, in the sense used in an indictment for burglary. — Blackwell v. State, Tex., 73 S. W. Rep. 960.

25. CANCELLATION OF INSTRUMENTS—Maintenance of Parents.—Allowance made in a decree canceling a deed given in consideration of support of one of the parties held sufficient compensation for expenses incurred in such support to the date of the cancellation.— McDowell v. McDowell, Ky., 73 S. W. Rep. 1022.

26. CANCELLATION OF INSTRUMENTS—Undue Influence. —One who, owing to the undue influence of others, is led to execute a contract to his prejudice, may, in a bill filed by him to set aside the contract, offer to return any consideration received.—McLeod v. McLeod, Ala., 34 So. Rep. 228.

27. CARRIERS—Duty to Receive Freight.—Railroad corporation cannot refuse to take freight from shippers. — Bedford-Bowling Green Stone Co. v. Oman, Ky., 73 S. W. Rep. 1038.

28. CARRIERS — Interstate Shipment. — The intent that the destination of a shipment shall be a point in another state held to make it an interstate shipment. — Gulf, C. & S. F. Ry. Co. v. Fort Grain Co., Tex., 73 S. W. Rep. 845.

29. CARRIERS — Passenger on Platform. — The law of negligence governing the standing on a platform of a moving street car in a city is not applicable in the case of one standing on such platform of a moving interurban car in the country.—Cincinnati, L. & A. Electric St. R. Co. v. Lohe, Ohio, 67 N. E. Rep. 161.

30. CARRIERS—Provocation for Assault.—Where a passenger had used insulting language to the conductor, who assaulted the passenger after leaving the car, the jury should be permitted to consider such conduct in assessing his damages. —Houston & T. C. R. Co. v. Batchler, Tex., 73 S. W. Rep. 981.

31. CARRIERS—Reasonable Rules. — There is an implied agreement that a passenger will obey the reasonable rules of a carrier, and where he purposely violates such rules, and is injured, he cannot recover. — Cincinnati, L. & A. Electric St. R. Co. v. Lohe, Ohio, 67 N. E. Rep. 161.

32. CARRIERS—Trespasser.—Railroad held liable for injuries to trespasser ejected from train while in motion by a brakeman, although acting in violation of company's rules.—Curtis v. Chicago, R. I. & P. Ry. Co., Mo., 73 S. W. Rep. 1103.

33. CHATTEL MORTGAGES—Exempt Property.— Where a chattel mortgage covered three mules, one of which was exempt from execution, the nonexempt mules must be first sold to satisfy the debt.—Baughn v. Allen, Tex., 73 S. W. Rep. 1063.

34. CHATTEL MORTGAGES — Prior Mortgage. — Equity has jurisdiction of an action praying judgment that a chattel mortgage made to plaintiffs be declared a lien on the chattels mentioned therein prior to certain other mortgages of earlier date assigned to the defendant.— Salmon v. Norris, 81 N. Y. Supp. 892.

35. CONSTITUTIONAL LAW—Alimony. — As the alimony allowed by a decree of divorce becomes a vested property right, it cannot be affected by subsequent legislation authorizing the modification or annulment of awards of alimony.—Goodsell v. Goodsell, 81 N. Y. Supp. 806.

36. CONSTITUTIONAL LAW—Due Process.—Due process of law held not violated by proceedings under a state statute relating to the assessment of personal property to a trustee, and making estimate of value conclusive on the owner who fails to make his return.—Glidden v. Harrington, U. S. S. C., 23 Sup. Ct. Rep. 574.

37. CONSTITUTIONAL LAW — Equal Protection. — The equal protection of the laws is not denied insurance companies by the provisions of Comp. St. Neb. ch. 43, §§ 43-45, allowing reasonable attorney's fee to plaintiffs in certain cases against insurance companies.—Farmers' & Merchants' Ins. Co. v. Dobney, U. S. S. C., 23 Sup. Ct. Rep. 565.

38. CONSTITUTIONAL LAW—Hours of Labor.—Pen. Code § 384h, subd. 1, relating to hours of labor, held unconstitutional as class legislation. — People v. Orange County Road Const. Co., N. Y., 67 N. E. Rep. 129.

39. CONSTITUTIONAL LAW—Railroad Aid Bonds. — Purchaser of county railroad aid bonds held to have no contract rights protected by federal constitution, where bonds are found invalid because purchase was made on faith of prior decisions that similar bonds were valid.— Zane v. Hamilton County, Ill., U. S. S. C., 23 Sup. Ct. Rep. 538.

40. CONTRACTS—Architect's Certificate.—An architect's certificate that the contractor has complied with the terms of a building contract and is entitled to payment is conclusive, unless impeached for fraud in obtaining it. —Schultze v. Goodstein, 81 N. Y. Supp. 946.

41. CONTRACTS — Delay in Performance. — Where an owner of a building went into possession while the builders were at work, she was estopped from recovering for delay in delivery of the property as claimed.— Sarrazin v. Alfred A. Adams & Co., La., 34 So. Rep. 301.

42. CONTRACTS — Monopolies. — Contract by dealer to maintain price asked by manufacturer of patent medicine held valid. — John D. Park & Sons Co. v. National Wholesale Druggists' Assn., N. Y., 67 N. E. Rep. 136.

43. CORPORATIONS — Right to Transact Business.—Enforcement of contracts of a foreign corporation will not be permitted, when the exercise of powers of such corporation are prejudicial to the state's interest or policy. —Chapman v. Hallwood Cash Register Co., Tex., 73 S. W. Rep. 969.

44. COUNTIES — Taxpayer's Suit. — The state is not a proper plaintiff in an action against a county auditor to

recover moneys belonging to the county, for which the county commissioners refuse to sue. — State v. Casper, Ind., 67 N. E. Rep. 185.

45. CRIMINAL EVIDENCE — Age of Prosecutrix.—On the issue as to the age of the prosecuting witness in a prosecution for rape, held that a fly leaf on which her father had written down the date of her birth was not admissible as original testimony. — Stone v. State, Tex., 73 S. W. Rep. 956.

46. CRIMINAL EVIDENCE—Assault with Intent to Kill.—Failure of the defendant to request that the objectionable testimony be stricken out, or that the court charge thereon, did not deprive him of the right to complain of its admission. — Barnard v. State, Tex., 73 S. W. Rep. 957.

47. CRIMINAL EVIDENCE—Embezzlement.—Statements by third persons, occurring one or two days after an alleged embezzlement, in defendant's absence, held inadmissible.—Feinstein v. State, Tex., 73 S. W. Rep. 1052.

48. CRIMINAL EVIDENCE — New Trial. — Newly discovered evidence, tending to impeach evidence of an accomplice on whose testimony accused was convicted, is no ground for new trial. — People v. Sullivan, 81 N. Y. Supp. 989.

49. CRIMINAL TRIAL — Conduct of Trial. - Where the conduct of a trial in the matter of excusing persons from jury and in convening and adjourning the court is not prejudicial to defendant and in violation of law, it is no ground for reversal. — Williams v. State, Fla., 34 So. Rep. 279.

50. CRIMINAL TRIAL — Remarks of Judge.—The utmost care should be used by the trial judge, where human life is involved, not to let any expression fall capable of being interpreted as an index of what he thinks of the prisoner, his counsel, or his case. — Mathis v. State, Fla., 34 So. Rep. 287.

51. DAMAGES — Sale of Business. — A contract for the sale of a business, binding defendant not to work in or operate another like business under penalty of a fine of $300, held to provide for liquidated damages, and not a penalty.—Liotta v. Abruzzo, 81 N. Y. Supp. 877.

52. DEATH—Statutory Plaintiffs.—In suits for wrongful death, defendant may show, in bar of plaintiff's right to recover, that there is *in esse* a person who is given by statute the precedent right of action over the plaintiff.—Louisville & N. R. Co. v. Jones, Fla., 34 So. Rep. 246.

53. DEEDS — Public Lands. — Parties acquiescing for over 30 years in possession of land by those claiming under a deed held to have given a construction thereto precluding them from recovery.—Huff v. Miniard, Ky., 73 S. W. Rep. 1036.

54. DEPOSITIONS—Introduction in Evidence.—The fact that a stranger to a deposition might have introduced it in evidence, as against those who were parties to it, does not affect his right to object to its introduction by them against him — Black v. Marsh, Ind., 67 N. E. Rep. 201.

55. DIVORCE—Res Judicata.—Foreign decree awarding custody of infant child in divorce suit held *res judicata* of all questions relating to the fitness of the parties at all times prior to such decree.—Wilson v. Elliott, Tex., 73 S. W. Rep. 946.

56. EASEMENTS — Right to Cut Stone. — The right to take cutting stone from a tract of land necessarily carries with it such reasonable use of the surface over the stone as is necessary to make the right available. — Bedford Bowling Green Stone Co. v. Oman, Ky., 73 S. W. Rep. 1038.

57. ELECTIONS — Ballots. — The ballots in a contested election case can under no circumstances be produced in open court and be made a record of. — Donnell v. Lee, Mo., 73 S. W. Rep. 997.

58. ELECTRICITY—Res Ipsa Loquitur. — Doctrine of *res ipsa loquitur* held to apply, where defendant's trolley wires fell into street, injuring plaintiff, notwithstanding plaintiff's explanation of the cause of the fall. — Clancy v. New York & Q. C. Ry. Co., 81 N. Y. Supp. 875.

59. EMINENT DOMAIN—Damages.—Judgment awarding damages in a lump sum for injury to two separate lots by construction of railroad tunnel must be reversed as a whole, where only one of the lots suffered substantial injury. — Peak v. Kings County Electric Ry. Co., 81 N. Y. Supp. 926.

60. EMINENT DOMAIN—Damages.—Measure of damages in condemnation proceedings by a railroad is the difference between the value of property just before and just after construction of railroad. — St. Louis Southwestern Ry. Co. of Texas v. Hughes, Tex., 73 S. W. Rep. 976.

61. EMINENT DOMAIN — Improvements. — Where the total value of property assessed, after the improvement is made, is less or more than the cost of the improvement, an enforcement of the lien cannot be had.—City of Louisville v. Bitzer, Ky., 73 S. W. Rep. 1115.

62. EVIDENCE — Pencil Memorandum —A pencil memorandum in the stock ledger of a national bank held inadmissible in evidence on the issue whether a pledgee of the stock had become the owner and chargeable with the personal liability of a stockholder. — Rankin v. Fidelity Ins., Trust & Safe Deposit Co., U. S. S. C., 23 Sup. Ct. Rep. 553.

63. EXECUTION—Injunction.—Injunction by an administrator to prevent sale on execution of interest of certain heirs in land belonging to an estate in course of administration held not to lie. — Hahn v. P. J. Willis & Bro., Tex., 73 S. W. Rep. 1084.

64. EXECUTION — Validity. — Person incarcerated in a reformatory held not a resident of the county, within Code Civ. Proc. § 1489, authorizing assignments against the person after return of execution unsatisfied.—American Surety Co. v. Cosgrove, 81 N. Y. Supp. 945.

65. EXECUTORS AND ADMINISTRATORS — Accounting.—Administrators of one estate should not make separate accountings —*In re* Smith's Estate, 81 N. Y. Supp. 1035.

66. EXECUTORS AND ADMINISTRATORS — Collecting Assets. — Assets belonging to the estate of a non-resident decedent are to be collected and administered under the laws of the state in which they are situated. — *In re* Crawford, Ohio, 67 N. E. Rep. 156.

67. EXECUTORS AND ADMINISTRATORS — Notice of Claim. — Common-law rule that mere lack of notice of claim does not excuse executor or administrator from paying same held not abrogated in Alabama. — Whetstone v. McQueen, Ala., 34 So. Rep. 229.

68. FALSE IMPRISONMENT — Burden of Proof. — In an action for false imprisonment, proof that plaintiff was imprisoned is sufficient to raise the presumption that such imprisonment was illegal, and the burden of establishing the contrary is on defendant. — Black v. Marsh, Ind., 67 N. E. Rep. 201.

69. FEDERAL COURTS—Comity.—Whether a state court should permit an action to be maintained therein, on the principle of comity between the states, is a question for the courts of that state to decide.—Finney v. Guy, U. S. S. C., 23 Sup. Ct. Rep. 558.

70. FEDERAL COURTS — Constitutional Law.—A federal question is not set up too late to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, where it was raised by assignments of error in the state supreme court and decided by a commission appointed to aid that court — Farmers' & Merchants' Ins. Co. v. Dobney, U. S. S. C., 23 Sup. Ct. Rep. 565.

71. FEDERAL COURTS—Crimes Against Federal Laws.—The offense of extorting money under a threat of exposure to criminal prosecution under the federal internal revenue law held excepted from the exclusive jurisdiction given the federal courts, by Rev. St. U. S. §§ 629, 711, U. S. Comp. St. 1901, pp. 507, 577, by provision of section 5328, page 3622. — Sexton v. People of State of California, U. S. S. C., 23 Sup. Ct. Rep. 543.

72. FEDERAL COURTS — Jurisdiction. — A decree of the circuit court of appeals, affirming a judgment of the circuit court, reversed for lack of jurisdiction in the circuit

court of appeals to review the judgment of the circuit court —Union & Planters' Bank v. City of Memphis, U. S. S. C., 23 Sup. Ct. Rep. 604.

73. FEDERAL COURTS — Mandamus. — Decision of state court, refusing petition for *mandamus* under a right given by the constitution of the United States, held reviewable in Supreme Court of the United States.—Detroit, Ft. W. & R. I. Ry. v. Osborn, U. S. S. C., 23 Sup. Ct. Rep. 540.

74 FEDERAL COURTS — Territorial Supreme Court — Affirmance by territorial supreme court of a judgment for plaintiff in an action of forcible entry and detainer cannot be reviewed by the Supreme Court of the United States, where the value of possession was less than $5,000.—McClung v. Penny, U. S. S. C., 23 Sup. Ct. Rep. 589.

75 FIRE INSURANCE—Warranty.—An iron safe clause, attached to an insurance policy, held to be a part thereof and to constitute a warranty.—Couch & Gilliland v. Home Protection Fire Ins. Co., Tex., 73 S. W. Rep. 1077.

76. FRAUDS, STATUTE OF — Division of Profits. — Contract to divide the profits derived from the sales of lands held not within statute of frauds. Sand & H. Dig. § 3469. —McClintock v. Thweatt, Ark., 73 S. W. Rep. 1093.

77. FRAUDULENT CONVEYANCES—Husband and Wife.—Wife held not charged with notice of fraudulent character of deed of trust executed by her son, by reason of knowledge in her husband.—M. A. Cooper & Co. v. Sawyer, Tex., 73 S. W. Rep. 992.

78. GUARDIAN AND WARD—Accounting.—A guardian held liable to account for the rate of interest stipulated for in notes received as part of the ward's estate.—Hedges v. Hedges, Ky., 73 S. W. Rep. 1112.

79. GUARDIAN AND WARD—Res Judicata.—Where an action by a dative tutor against a former tutor and undertutor is dismissed quoad the tutor, on the ground that the remedy is to demand an account, such action can no longer be maintained as against the undertutor. —Succession of Lalmont, La., 34 So. Rep. 298.

80. GUARDIAN AND WARD—Support of Ward.—A father, as guardian of his minor children, held liable to contribute to their support to the extent of $200 per year but entitled to charge for their education, clothing, and medical bills.—Harper v. Payne, Ky., 73 S. W. Rep. 1123.

81. HIGHWAYS — Injuries to Third Persons.—Where plaintiff, five years of age, ran into the street and was struck by a horse driven by defendant's servant, who was not shown to have been negligent, defendant held not liable.—Hoff v. Hahn, Ky., 73 S. W. Rep. 1015.

82. HOMICIDE — Accessory Before the Fact. — There can be an accessory before the fact in the crimes of murder in the third degree and manslaughter.—Mathis v. State, Fla., 34 So. Rep. 287.

83. HOMICIDE—Assault With Intent to Kill.—In a prosecution for assault, evidence that F, on whose farm the offense was committed, whipped people to enforce obedience, held inadmissible to show motive for the assault or the relationship of the parties.—Barnard v. State, Tex., 73 S. W. Rep. 957.

84. HOMICIDE—Dying Declarations.—Writing, neither signed, read over, nor recognized by decedent, held inadmissible as his dying declaration.—Fuqua v. Commonwealth, Ky., 73 S. W. Rep. 784.

85. HOMICIDE—Threats.—Proofs of threats are inadmissible on a trial for murder, without evidence of an overt act.—State v. Tasby, La., 34 So. Rep. 300.

86. INDICTMENT AND INFORMATION—Bill of Particulars. —Where the counts in an indictment are so general that they do not fully advise the accused of the crime with which he is charged, the court can order a bill of particulars.—Mathis v. State, Fla., 34 So. Rep. 287.

87. INDICTMENT AND INFORMATION—Description of Accused.—An indictment of "one Morgan, whose given name is to the grand jury unknown," is not defective for insufficient description of accused.—Morgan v. State, Tex., 73 S. W. Rep. 968.

88. INDICTMENT AND INFORMATION—Lost Indictment. —Where an indictment is lost, the prosecution may proceed to trial on a substituted copy, if exact, and the proof of it conclusive.—Roberson v. State, Fla., 34 So. Rep. 294.

89. INJUNCTION—Executive Administration.— Prevention of irreparable injury and multiplicity of suits cannot be invoked as ground of equitable relief against threatened survey by the land department of lands which complainants claim, but which the department claims to be unsurveyed public lands. — Kirwan v. Murphy, U. S. S. C., 23 Sup. Ct. Rep 599.

90. INJUNCTION—Local Option.—A violation of an injunction restraining the final publication of a local option election notice held no defense to a prosecution for the violation of the local option law.—Lively v. State Tex., 73 S. W. Rep. 1048.

91. INJUNCTION — Watching Complainant's Place of Business.—Injunction to restrain watching complainant's place of business to determine from whom he purchased certain goods will be granted.—John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n., N. Y. 67 N. E. Rep. 136.

92. INTOXICATING LIQUORS—Local Option.—To constitute a violation of the local option law, there must be a sale alleged and proved.—Stephens v. State, Tex., 73 S. W. Rep. 1056.

93. INTOXICATING LIQUORS—Minor.—Emancipation of minor held not a defense to parent's action on liquor dealer's bond for permitting the minor to enter and remain in saloon.—Cox v. Thompson, Tex., 73 S. W. Rep. 950.

94. JUDGMENT — Res Judicata.— Decree in partition suit held *res judicata* as to the rights of complainant's successor in interest in a subsequent petition to enforce the decree.—Torrence v. Shedd, Ill., 67 N. E. Rep. 168.

95. JUDGMENT — Service of Process. — A judgment against a corporation on defective service, the corporation having entered a special appearance to move to quash the service, will be reversed.—Drew Lumber Co. v. Walter, Fla., 34 So. Rep. 244.

96. JUDGMENT— Statutory Liability. — Full faith and credit held not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation in an action to enforce their statutory liability. —Finney v. Guy, U. S. S. C., 23 Sup. Ct. Rep. 558.

97. JURY—Change of Venue.—Where cause is transferred from county court in probate to district court, parties become entitled to a trial by jury.—Stone v. Byars, Tex., 73 S. W. Rep. 1086.

98. JURY—Swearing In.—The better practice is to postpone the swearing in chief of the jurors until the full panel is obtained, so as to allow the longest possible time for peremptory challenges.—Mathis v. State, Fla., 34 So. Rep. 287.

99. LANDLORD AND TENANT—Forcible Entry and Detainer.—A landlord cannot maintain unlawful entry and detainer only against a person in possession of a part of the demised premises, while his tenant is in possession of the remainder.—Hammel v. Atkinson, Miss., 34 So. Rep. 225.

100. LANDLORD AND TENANT—Growing Crops.—Tenants from year to year, entitled to growing crops of clover under lease, held entitled thereto against one purchasing premises, with knowledge, after time limited by Rev. St. 1899, § 4109, for terminating lease.—Horman v. Cargill, Mo., 73 S. W. Rep. 1101.

101. LANDLORD AND TENANT—Limitations.—A holding over for a third term held under an implied contract, and not under the written lease, and hence an action for rent accrued was subject to the two-year statute of limitations.—Roller v. Zundelowitz, Tex., 73 S. W. Rep. 1070.

102. LARCENY—Breach of Trust.—The act of the manager of a store in taking certain goods therefrom held not a larceny, but merely a breach of trust.—Bismarck v. State, Tex., 73 S. W. Rep. 965.

103. LARCENY—Indictment. — There was no variance

between indictment for theft and the proof, though indictment described owner of the property as "M," when he was in fact "M. Jr."—Wesley v. State, Tex., 73 S. W Rep. 960.

104. LARCENY—Possession of Property.—In a prosecution for theft, refusal to charge that the jury should acquit, if defendant's possession of the property was not recent, held error.—Porter v. State, Tex., 73 S. W. Rep. 1053.

105. LIBEL AND SLANDER—Board of Health.—The publication by a board of health of a preamble alleging that there had been a number of deaths in the village from negligence of the physician attending the patients held not privileged.—Mauk v. Brundage, Ohio, 67 N. E. Rep. 152.

106. LICENSES — Validity. — License tax of $50 per day, imposed on "fire sale" and "bankrupt sale" stores of temporary character, held oppressive and unreasonable. —City of Springfield v. Jacobs, Mo., 73 S. W. Rep. 1097.

107. LIMITATION OF ACTIONS — New Promise. — One suing on a note, barred by limitations on its face, but which the defendant had promised to pay, may declare on the original note, and, if limitations is pleaded, reply the new promise. — Vinson v. Palmer, Fla., 34 So. Rep. 276.

108. MALICIOUS PROSECUTION—Probable Cause.—Final order adjudging a party guilty of contempt held not conclusive evidence of probable cause in a subsequent action for malicious prosecution of the contempt proceeding.—Mesnier v. Denike, 81 N. Y. Supp. 818.

109. MASTER AND SERVANT—Assumed Risk. — Risk of injury from sudden jerk in management of freight train held not assumed, as a matter of law, by a brakeman standing on the icy roof of a car. — Texas & P. Ry. Co. v. Behymer, U. S. S. C., 23 Sup. Ct. Rep. 622.

110. MASTER AND SERVANT—Contract of Service.—It is an actionable wrong to induce the servant of another to break his contract of employment. — J. S. Brown Hardware Co. v. Indiana Stove Works, Tex., 73 S. W. Rep. 800.

111. MASTER AND SERVANT — Failure to Warn. — Railroad company held negligent in failing to warn a call boy in a switchyard of the danger of being struck by certain scales while riding on the side of a freight car.— St. Louis Southwestern Ry. Co of Texas v. Spivey, Tex., 73 S. W. Rep. 973.

112. MASTER AND SERVANT—Negligence.—Where a servant was injured by the negligence of one of two of defendant's other servants, the question as to which one was negligent was for the jury.— Kentucky Distilleries & Warehousemen v. Schreiber, Ky., 73 S. W. Rep. 769.

113. MASTER AND SERVANT — Negligence of Vice Principal. — The neglect of the foreman of a railway bridge gang to see that his workmen left a clear track for an approaching train held the neglect of a vice principal of the railway company, under Sayles' Civ. St. Tex. 1897, art. 4560*g*. — Texas & P. Ry. Co. v. Carlin, U. S. S. C., 23 Sup. Ct. Rep. 585.

114. MASTER AND SERVANT — Suitability of Appliance. — Push stick, used between locomotive and car for moving the latter, held a proper appliance.—Bookman v. Masterson, 81 N. Y. Supp. 962.

115. MONOPOLIES — Anti-Trust Act. — Acts 1899, p. 251, ch. 146, § 14, anti-trust law of 1899, held not to make the act of 1899 a part of the act of 1895, Acts 1895, p. 112, ch. 83, so as to incorporate into the former the provisions of section 12 of the latter.—State v. Laredo Ice Co., Tex., 73 S. W. Rep. 651.

116. MONOPOLIES—Proprietary Medicines.—Equity will not restrain agreement between wholesale dealers and manufacturers of proprietary medicines, whereby small concerns are unable to purchase the goods as cheap as large ones.—John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n N. Y., 67 N. E. Rep. 136.

117. MORTGAGES—Acknowledgment.—In ejectment by the purchaser of mortgaged lands on foreclosure, defendant cannot set up the invalidity of the mortgage because of the insufficiency of the acknowledgment.—Farmers' Sav. & Bldg. & Loan Ass'n, v. Greenwood, Ala., 34 So. Rep. 227.

118. MORTGAGES—Satisfaction. — The entry of satisfaction of a mortgage given to two persons, purporting to be by but one of them severally, will not protect subsequent mortgagees, so far as the first mortgagee not releasing is concerned.—Howe v. White, Ind., 67 N. E. Rep. 203.

119. MORTGAGES — Trover for Conversion. — A trustee and beneficiary under a deed of trust may maintain trover for the conversion of trust property. — Edge v. Emerson, Ark., 73 S. W. Rep. 793.

120. MUNICIPAL CORPORATIONS — Criminal Liability.— Municipal corporation held not criminally liable for permitting a nuisance on private property within its limits. — City of Georgetown v. Commonwealth, Ky., 73 S. W. Rep. 1011.

121. MUNICIPAL CORPORATIONS — Ice in Street. — Elevated railroad company held guilty of negligence in failing to provide drip pans to prevent water dripping into street below its station and forming ice, on which pedestrian slipped. — White v. Manhattan Ry. Co., 81 N. Y. Supp. 1011.

122. MUNICIPAL CORPORATIONS — Opening Streets. — It was improper for the common council to omit from the assessment for the construction of a street lands which it had determined to be within the area which would be benefited by the opening of the street. — Harriman v. City of Yonkers, 81 N. Y. Supp. 823.

123. MUNICIPAL CORPORATIONS — Order Appointing Health Officer. — An order of the mayor and board of aldermen construed, and held a mere appointment of plaintiff as health officer, and not a contract to treat smallpox patients.—Town of Pass Christian v. Washington, Miss., 34 So. Rep. 225.

124. MUNICIPAL CORPORATIONS — Repair of Sidewalks. —Lack of funds on the part of a municipality is no justification for its failure to repair streets and sidewalks.— City of Dallas v. Strayer, Tex., 73 S. W. Rep. 980.

125. MUNICIPAL CORPORATIONS — Sale for Costs and Taxes.—A sale of land by a city for taxes and costs is void in the absence of any provision by charter or ordinance authorizing a sale for costs.—May v. Jackson, Tex., 73 S. W. Rep. 988.

126. MUNICIPAL CORPORATIONS—Street Improvements. —Land within the limits of a city, though used for agricultural purposes, may be assessed for street improvements.—Barber Asphalt Pav. Co. v. Garr, Ky., 73 S. W. Rep. 1106.

127. NAVIGABLE WATERS — State Control Over Tide Land.—The state of California has a right to convey its title to tide lands surrounding islands in the Bay of San Francisco free from any easement appurtenant to such islands.—United States v. Mission Rock Co., U. S. S. C., 23 Sup. Ct. Rep. 606.

128. NEW TRIAL — Contributory Negligence. — A child can not be held guilty of contributory negligence, unless shown to have been of sufficient understanding to enable it to exercise reasonable care. — Harper v. Kopp, Ky., 73 S. W. Rep. 1127.

129. NUISANCE—Cooking Onions and Cabbage. — Cooking is not a nuisance *per se*, nor is the cooking of onions and cabbage necessarily a nuisance. — Shroyer v. Campbell, Ind., 67 N. E. Rep. 193.

130. OFFICERS — Power to Remove. — General power of president to remove appraisers of merchandise, though appointed by and with the advice and consent of the senate, held not restricted to removal for inefficiency, neglect of duty, or malfeasance in office. — Shurtleff v. United States, U. S. S. C., 23 Sup. Ct. Rep. 535.

131. PARTNERSHIP—Construction.—A banking partnership held not dissolved by the death of one of its members, and that the estate of such member was bound to contribute to a loss sustained on a guaranty executed by

the surviving partners. — Hax v. Burnes, Mo., 73 S. W. Rep. 928.

152. PAYMENT—Checks as Payment. — Delivery and indorsement of certain checks held a part payment of the consideration for certain notes secured by a deed of trust.—Brown v. Schintz, Ill., 67 N. E. Rep. 172.

153. PLEADING — Construction of Statutes of Other States.—A state court is not concluded as to the construction of the statutes of another state and the decisions of its courts, on the theory that defendant, by demurring to the complaint, admitted that such was the correct conclusion to be drawn from them. — Finney v. Guy, U. S. S. C., 23 Sup. Ct. Rep. 558.

154. PRINCIPAL AND AGENT — Proving Agency. — Agency can not be proved by the acts or declarations of the agent, which are not shown to have been known by the principal.—M. A. Cooper & Co. v Sawyer, Tex., 73 S. W. Rep. 992.

155. PROCESS — Presumption of Service. — In the absence of a showing to the contrary, it is presumed that summons was served on the defendant named in the complaint. - Union Traction Co. v. Barnett, Ind., 67 N. E. Rep. 205.

156. PUBLIC LANDS—Abandonment.—Confirmation of a Spanish land grant cannot be had in court of private land claims, where possession had been abandoned for at least nine years before the treaty of 1848 with Mexico. —Sena v. United States, U. S. S. C., 23 Sup. Ct. Rep. 596.

157. PUBLIC LANDS—Railroad Land Grants. — The secretary of the interior was not authorized, on acceptance of a map of definite location, to withdraw from the settlement laws any lands within the indemnity limits of the grant made to the California & Oregon Railroad Company by Act July 25, 1866, ch. 242 (14 Stat. 239).—Oregon & C. R. Co. v. United States, U. S. S. C., 23 Sup. Ct. Rep. 615.

158. PUBLIC LANDS — Settlement of Cherokee Outlet. — Description in president's proclamation opening to settlement lands ceded by the Cherokee Nation held to control any doubt arising from further statements in the proclamation defining the purposes for which the strip was to be used.—Winebrenner v. Forney, U. S. S. C., 23 Sup. Ct. Rep. 590.

159. RAILROADS — Switches and Sidings. — Property owner held entitled to damages, where railroad, authorized to build single track in highway, constructs switches and sidings.—Stephens v. New York, O. & W. Ry. Co., N. Y., 67 N. E. Rep. 119.

160. RECEIVERS—Partition Suit.—In a proceeding to enforce a decree in a partition suit, appointment of a receiver held unauthorized.—Torrence v. Shedd, Ill., 67 N. E. Rep. 168.

161. SHERIFFS AND CONSTABLES — Service of Attachment.—The liability of a sheriff, serving an attachment, for taking insolvent sureties on a forthcoming bond, cannot exceed that of the sureties. — Edwards-Barnard Co. v. Pflanz, Ky., 73 S. W. Rep. 1018.

162. STREET RAILROADS — Defect in Street. — Where a street railway company, after tearing up a brick-paved street to lay its tracks, replaces the paving, a pedestrian has a right to presume that the street is safe. — Union Traction Co. v. Barnett, Ind., 67 N. E. Rep. 205.

163. TAXATION — Transfer Tax. — Testamentary provision, intended in possible substitution for an annuity created by testator in his lifetime, held not subject to transfer tax.—*In re* Daniell's Estate, 81 N. Y. Supp. 1033.

164. TRESPASS TO TRY TITLE—Evidence. — That plaintiffs, in trespass to try title, had been contradicted on material issues, did not authorize introduction of evidence in support of their reputation for truth and veracity.—White v. Epperson, Tex., 73 S. W. Rep. 551.

165. TRIAL — Deposition. — Where a deposition is not competent against a party, he is entitled to an instruction limiting it to the parties against whom it is competent.—Black v. Marsh, Ind., 67 N. E. Rep. 201.

166. TRUSTS — Deposit in Savings Bank. — A deposit in a savings bank "in trust for" another held to create an irrevocable trust, and money withdrawn by the depositor may be recovered by the *cestui que trust*.—Marsh v. Keogh, 81 N. Y. Supp. 825.

167. TRUSTS—Evidence.—Memoranda in the handwriting of a deceased trustee, appearing to be a list of debts due the estate, held admissible to show that the check issued was not to pay a debt, but was a loan. — Griffen v. Train, 81 N. Y. Supp. 977.

168. TRUSTS—Removal of Trustee.—The intermingling of trust funds with the individual funds of a trustee, and mutual hostility between the trustee and fathers of minor *cestuis que trustent*, held to authorize the trustee's removal.—Gaston v. Hayden, Mo., 73 S. W. Rep. 938.

169. USURY — Customs. — A custom of a live stock exchange to charge a buying commission, in addition to interest, on loaning money for the purchase of cattle, held not to justify such charge, where it rendered the loan usurious.—Cowgill v. Jones, Mo., 73 S. W. Rep. 995.

170. VENDOR'S LIEN—Possession of Land.—A vendor's lien may be implied in equity to belong to a vendor for the unpaid price, though such vendor, after executing a contract of sale, remains in possession of the land sold. —Johnson v. McKinnon, Fla., 34 So. Rep. 272.

171. WAR — Prize Court. — A prize court may enter a decree against the United States, for damages sustained by the claimants of vessels captured by its navy as prize of war, the proceeds of which have been ordered restored to such claimants.—United States v. The Paquete Habana, U. S. S. C., 23 Sup. Ct. Rep. 593.

172. WATERS AND WATER COURSES — Taxation of Waterworks.—The value of a waterworks plant for purposes of taxation may be considered by the courts in determining the reasonableness of the water rates fixed by a board of supervisors. — San Diago Land & Town Co. v. Jasper, U. S. S. C., 23 Sup. Ct. Rep. 571.

173. WILLS—Restriction on Alienation. — Under Ky. St. §§ 1681, 2355, title of devisee may be subjected by his creditors, though alienation by him was prohibited until he arrived at a certain age. — Smith v. Smith, Ky., 73 S. W. Rep. 1028.

174. WILLS — Revocation.—An agreement of a married woman to make a will with certain provisions, if her husband made no will, held not to revoke her existing will.—Hibberd v. Trask, Ind., 67 N. E. Rep. 179.

175. WILLS—Rights of Substituted Legatee.—Descendants of son, on his death before testator's widow, held to take his interest in testator's estate by substitution directly under testator's will and not as heirs of the son, and therefore to take free of the lien of a mortgage executed by the son on his interest. — Weymann v. Weymann, 81 N. Y. Supp. 959

176. WITNESSES—Competency. — Incompetency of son to testify as to declarations of his deceased father regarding the latter's intention concerning certain land held not affected by son's conveyance of his alleged interest therein to plaintiffs. — Huff v. Miniard, Ky., 73 S. W. Rep. 1036.

177. WITNESSES — Dying Declaration.—A witness who wrote down a dying declaration may refresh his memory by a reference to the memorandum made. — Fuqua v. Commonwealth, Ky., 73 S. W. Rep. 789.

178. WITNESSES—Impeachment. — Where a state's witness had proven adverse, she may be examined as to whether she had not previously made a statement contrary to the present adverse testimony.—Bryan v. State, Fla., 34 So. Rep. 243.

179. WITNESSES — Life Insurance. — In an action on a policy, an answer to a question as to whether the effects produced by alcohol are easily observed held properly stricken out as not responsive. — Union Life Ins. Co. v. Jameson, Ind., 67 N. E. Rep. 199.

180. WITNESSES — Physician. — Plaintiff, by calling his physician to testify, held not to waive his privilege as to the ambulance surgeon, who had treated him at the hospital, before he was taken home, where his physician treated him.—Duggan v. Phelps, 81 N. Y. Supp. 916